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WORK OF THE MISSISSIPPI SUPREME COURT FOR SEPTEMBER 1941, AND MARCH 1942, TERMS

WORK OF THE 1942 SESSION OF THE MISSISSIPPI LEGISLATURE

Earl T. Thomas

November, 1942

VOLUME XV NUMBER 1

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THE WORK OF THE MISSISSIPPI SUPREME COURT FOR THE SEPTEMBER 1941, AND THE MARCH 1942, TERMS

I.

COMMERCIAL LAW

*Mary Caruthers Gholson**

A. Contracts

(1) Champerty and Maintenance

Whelchel v. Stennett[1] involved an alleged contract between appellant and two attorneys, the appellees. Appellant had brought suit on this contract claiming that he had contacted appellees in behalf of one L. L. Little and requested that they represent Little in a slander suit and that appellees had accepted this employment on a contingent basis for 60 per cent of whatever judgment was secured. Appellant stated that appellees further agreed that appellant should have one-third of their 60 per cent contingent fee in consideration of his past efforts and future services to be rendered by obtaining information and otherwise assisting with Little's suit. Both of the appellees denied in their testimony that they made such a contract, but appellant stated that as a result of this contract he gave informaion to both appellees, assisted them in obtaining evidence, and investigated jurors. Appellant had, therefore, brought this suit for the purpose of obtaining the one-third of 60 per cent of the judgment obtained by Little in his slander suit. In denying recovery on this alleged contract, the Court held that this agreement violated Secs. 3711 and 3712, Code of 1930, making provisions against champerty and maintenance, and was void as against public policy. In affirming the judgment dismissing this action, the Court said:

> "To enforce such contracts would place too great a temptation on the outside helper to procure false evidence. Its contingent nature would have a tendency to induce perjury and trickery in procuring evidence."[2]

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*Member Mississippi and Claiborne County Bars; Port Gibson, Mississippi.

[1] 5 So. (2d) 418 (Miss. 1942).

[2] *Id.* at 420.

(2) Illegal Contracts

In *Yazoo & Mississippi Valley R. R. v. Whittington,*[3] a father, in order to look after the interests of his minor daughter, attended a conference of attorneys for the purpose of arriving at a settlement of a law suit in which his daughter had recovered a judgment of $12,500.00 against the railroad for injuries received by her. The father agreed to accept a cash settlement of $2800.00, which he considered inadequate, upon condition that the railroad would pay to him the sum of $95.00 to cover expenses incurred by him in connection with the litigation. The railroad paid the $2800.00 but declined to pay the $95.00 and denied having promised it to the father. The father brought suit for this amount and secured a judgment in the lower court. This judgment was reversed on appeal on the ground that such a contract is illegal and unenforceable since it impaired or tended to impair the fidelity of a party thereto to a third person with whom such party's relations were of a confidential or fiduciary nature.

(3) Brokers' Contracts

The case of *Case v. Harrison*[4] involved the construction of a contract between appellant and appellee, a broker, who claimed that he was entitled to a commission for his services in regard to a sale of certain real property. Appellant, the owner of the land had agreed to pay the broker a commission of 5 per cent "in event" the broker secured a purchaser in accordance with stated terms. The agreement specified a price of $65.00 per acre for the land which the broker was to attempt to sell. The broker assisted in securing a purchaser but because of various circumstances, the owner finally sold the property to this purchaser for less than the stipulated $65.00 per acre. The owner did not reduce the price to avoid payment of a commission, nor did he interfere with any sale which the broker might have secured at $65.00 an acre. The Court held that the right of a broker to recover a commission for his services must be predicated on a contractual relation. In this case, the right to a commission depended on the broker's finding a purchaser ready to buy the property at the price of $65.00 per acre set forth in the agreement, and since the broker did not find a purchaser at such a price, he was not entitled to a commission, although the owner sold the property at a lower price to a purchaser produced by efforts of the broker. Therefore, since the contract here involved expressly made the payment of a commission depend on the obtaining of a certain price for the property, the broker was denied recovery on appeal.

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[3]191 Miss. 776, 4 So. (2d) 343 (1941).
[4]6 So. (2d) 582 (Miss. 1942).

B. Quasi Contracts

In *Old Men's Home, Inc. v. Lee's Estate,*[5] the Court held that a quasi contractual relation arose out of the following circumstances: Lee, an aged and infirm man, had falsely represented that he was a pauper and had thereby secured admittance to the Old Men's Home, where he was supported and cared for until his death. It was afterwards discovered that he had a bank account of more than $5,000.00. The Old Men's Home claimed reimbursement from decedent's estate and appealed from an adverse judgment in the lower court. On appeal it was held that the Old Men's Home was entitled to recover reasonable compensation for decedent's care and support on the theory that the circumstances gave rise to a quasi or constructive contract based on an obligation imposed by law. The Court stated that a quasi contract rests on the equitable principle that a person should not be unjustly enriched at the expense of another; and, therefore, an obligation to pay is created by law where the acts of the parties or others have placed money in the possession of one person when he in equity and good conscience should not be allowed to retain it. Appellee further claimed that the amount claimed by appellant constituted a claim for unliquidated damages for a tort and, therefore, was not recoverable from decedent's estate, but the Court rejected this theory since the claim was for reasonable compensation for care and support and represented approximately the actual cost to the Home for this work and expense.

C. Negotiable Instruments

(1) Subrogation

In the case of *National Surety Corp. v. Edwards House Co.,*[6] the appellant as surety on the bond of a local agent of the Farm Credit Administration had reimbursed the United States Government for a sum of money which had been fraudulently obtained by this agent by forgery of an application, note, and deed of trust. After forging the name "Amos Easterling" on these instruments the agent had received a check drawn by the manager of the Farm Credit Administration at Memphis, Tennessee, on the United States Treasury, payable to Amos Easterling. The agent had then endorsed that name and his own name on the check and had received cash for it from the appellee, Edwards House Company. Then, after the check was endorsed by the Edwards House Company, it was deposited to its credit at the Jackson-State National Bank, also an appellee, which likewise endorsed the check and thereafter secured the proceeds from the United States Treasury. The appellant claimed that under the equitable doctrine of subrogation it was entitled to recover the amount of the check

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[5]191 Miss. 669, 4 So. (2d) 235 (1941). A comment on this case appears in (1942) 14 Mississippi Law Journal 527.

[6]191 Miss. 884, 4 So. (2d) 340 (1941).

from the appellees as indorsers and sought to be subrogated to the alleged right of the United States to recover against them on the theory that they had guaranteed the genuineness of the signature of Amos Easterling. The Court affirmed the judgment of the lower court on the ground that the doctrine of subrogation can not be invoked against one whose equities are equal or superior to the litigant seeking to be subrogated. Since appellees were innocent indorsers receiving no benefit from the transaction, their equities were equal or superior to those of the surety.

(2) Estoppel—Limitation of Actions

The case of *Montgomery v. Yarbrough*[7] was a suit based on two promissory notes against an indorser of the notes. Since the notes were executed and delivered in Alabama, the liability of the indorser was controlled by the substantive law of Alabama. It was claimed that at the request of the indorser after maturity of the notes the holder had agreed and promised to foreclose the chattel mortgages securing them and that this agreement would work an equitable estoppel against the holder to prevent him from later bringing suit against the indorser on these notes. It was held that in order for a representation to have the effect of an estoppel it must ordinarily have reference to a present or past state of things, and that a representation regarding the future is merely a statement of intention creating no estoppel, or if it is to be regarded as a contract, it must be supported by consideration and have the other necessary elements of such. Therefore, this defense of the indorser could not be upheld. However, recovery could not be had on one of the notes since it was barred by the Mississippi six-year statute of limitations.[8] It was claimed by the holder that partial payments having been made on this note during the six-year period, the action could be brought since under the Alabama statute[9] partial payments made on a note during this period would toll limitation. The Court held that this contention could not be sustained since the *lex fori* governs as to the remedy for the enforcement of a right in Mississippi under a contract executed in another state.[10]

(3) Failure of Consideration as Defense

In the case of *Stout v. American National Bank & Trust Co.*,[11] the appellee had brought suit against the appellant on a promissory note given by him in Mississippi to the National Air Conditioning Corporation, payable in Alabama and purchased by the appellee at its place of business in that state. Appellant defended this action on the ground that he had

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[7]6 So. (2d) 305 (Miss. 1942), suggestion of error overruled, 6 So. (2d) 925 (Miss. 1942).

[8]MISS. CODE ANN. (1930) § 2292.

[9]ALA. CODE (1940) tit. 7, § 40.

[10]See Note, Foreign *Statutes of Limitation in the Mississippi Courts* (1941) 13 MISSISSIPPI LAW JOURNAL 619.

[11]7 So. (2d) 824 (Miss. 1942).

never received the air conditioning units for which the note was given, and, therefore, there was a failure of consideration and that the purchaser had knowledge of this circumstance. It was held that evidence that the maker of the note had informed the purchaser before purchase of the note that the maker had not received delivery was sufficient to submit the case to the jury under Alabama law[12] on the question of *bona fide* purchase; and the case was, therefore, reversed and remanded.

(4) Embezzlement

The case of *Reese v. State*[13] involves a situation wherein appellant had been convicted of embezzling money belonging to the Southern Undertaking Association that had come into his possession as an agent of the Association. The conviction was based on evidence that appellant as agent for the Association had received certain checks payable to it and had fraudulently endorsed them for securing the proceeds. On appeal it was contended that the evidence failed to disclose that the checks or their proceeds were the property of the Southern Undertaking Association and that appellant had converted them to his own use. The delivery of these checks was to an employee of the payee who was without authority to accept them. It was, therefore, held that they remained the property of the drawer until there was a valid delivery and acceptance thereof or their equivalent by the payee; hence, as appellant contended, the property here involved did not belong to the Southern Undertaking Association at the time of the alleged embezzlement.

D. Insurance

A number of recent decisions of the Mississippi Supreme Court involve the interpretation of insurance policies and contracts. In *Praetorians v. McCrary*,[14] it was held that where the insured, in January, 1935, borrowed the full amount of the reserve credited to his life insurance policy when all premiums were paid until April, 1935, and when no premiums were paid from the latter date and insured died in December, 1935, the policy was forfeited by such default, although the policy would have been in force under extended insurance clause contained therein if no loan had been made. This decision was based on the fact that the policy provided that no loan should avoid the insurance unless the loan and other accrued indebtedness equaled or exceeded the cash value when the loan became due or when there was default in the payment of premiums. Because of the loan there was no reserve with which to keep the policy in effect during the months in which there was default in payment of premiums.

The case of *Anderson v. New York Life Ins. Co.*,[15] involves a life policy issued and delivered in Tennessee providing that if the policy was

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[12]Snell National Bank v. Janney, 219 Ala. 396, 122 So. 362 (1919).
[13]5 So. (2d) 236 (Miss. 1941).
[14]191 Miss. 438, 3 So. (2d) 832 (1941).
[15]6 So. (2d) 293 (Miss. 1942).

not surrendered for cash or for paid-up insurance within three months after default in payment of a premium, its cash surrender value at date of default, less any indebtedness, should automatically purchase continued insurance. The policy further authorized a deduction of a surrender charge of not more than 1½ per cent of the face of the policy in computing cash surrender value and set forth a table of guaranteed surrender values in which the surrender charge had been deducted. Appellant claimed the benefits of this policy under extended insurance clause and contended that a surrender charge of $35.00 was wrongfully made and that this charge was proper only in case of actual surrender. This life policy had been submitted to the Tennessee insurance commissioner and approved. The Court held that the $35.00 surrender charge was properly made; therefore, the policy had lapsed at the time of insured's death and no recovery was allowed.

The insurance policy involved in the case of *National Mutual Casualty Co. v. Clark*[16] agreed to indemnify a taxicab company for liability for damages for bodily injury including death "caused by accident and arising out of ownership, maintenance or use of the automobile." The Court held that a judgment recovered by a taxicab passenger against the taxicab owner for injuries sustained from an assault committed by a taxicab driver after the passenger had left the taxicab was not within the coverage of this policy. The Court was divided in this decision. The majority expressed the opinion that:

> "We do not mean to hold that injury from assault may never be covered by such a policy, but that in any event the vehicle itself must be an active accessory. Liability is denied not because an assault was a factor in the injury but because the operation and use were not factors in the assault."[17]

The dissenting opinion expresses a different view:

> "The driver wrongfully demanded additional taxi fare and assaulted the passenger because he did not pay it. The injury was directly connected with and grew out of the operation of the taxi."[18]

In *National Life & Accident Ins. Co. v. Green,*[19] it was held that where a life policy was issued upon the applicant's statements and without examination of applicant by a physician, a provision in the policy that if insured was not in sound health on the date thereof, insurer's liability should be discharged by payment of premiums received under policy should not be construed as meaning that only in case of a change in con-

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[16] 7 So. (2d) 800 (Miss. 1942).
[17] *Id.* at 805.
[18] *Ibid.*
[19] 191 Miss. 581, 3 So. (2d) 812 (1941).

dition of applicant's health for the worse between date of acceptance of application and date of delivery of policy, insurer is discharged; but under this policy "sound health" is a question of fact and a condition precedent to insurer's liability. The majority opinion distinguished this case from the cases where the applicant is examined by insurer's physician and stated that in the latter case the knowledge gained by the physician is imputed to the insurer and insurance should become effective under a good health clause unless applicant is in worse health upon delivery of the policy than when examination was made.

Ford et al. v. American Home Fire Ins. Co.,[20] held that where a wife furnished money to buy a business and to purchase and install more furniture and equipment, and her husband agreed to conduct this business as her agent, the wife has an equitable title even if the bill of sale was made out to her husband. A resulting trust in favor of the wife is presumed from the purchase of property by her husband with her money and the taking of title in his name. Since the wife could by bill in chancery acquire the unconditional legal title to this property, her title sufficiently complied with a provision of a fire insurance policy requiring that insured's interest be "unconditional and sole ownership."

The case of *Planters Lumber Co. v. Trinity Universal Ins. Co.*,[21] involved a situation where a lumber company had failed to comply with representations contained in its application for a fidelity bond covering an employee of the company. The lumber company had represented in its application that a complete audit of cash securities and accounts would be made two or four times annually and that statements would be sent to customers by someone other than the employee. The employee embezzled certain property, and this action was brought as a result. From the evidence it appeared that the representations made by the lumber company in its application were material, and that if they had been true, the embezzlement probably would not have occurred. The bond would not have been executed except for reliance on these representations. It was, therefore, held that failure to comply with these representations defeated recovery on the bond for loss sustained through this embezzlement.

In the case of *Faulkner v. Faulkner*,[22] two rival claimants contended over the benefits of an insurance policy. The evidence tended to show that the insured had attempted to have the beneficiary of this policy changed from Pauline Faulkner to Emma Faulkner. It appeared that the insured had complied with all formal requirements for making this change and had made proper application therefor, but through some mistake the beneficiary on the policy had not in fact been changed. The discovery

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[20] 5 So. (2d) 416 (Miss. 1942).
[21] 191 Miss. 875, 4 So. (2d) 300 (1941).
[22] 5 So. (2d) 421 (Miss. 1942).

that the beneficiary was unchanged was not made until after the death of insured. It was held that the original beneficiary had no vested rights in the policy but only an inchoate, imperfect, and ambulatory right prior to insured's death. Since the insured had reserved the right to change the beneficiary of the life policy and his intention to make such a change was expressed in the manner required by the insurer, his intention was given full weight on the ground that equity will regard that as done which ought to have been done.

Williams, State Ins. Comm'r. v. General Insurors, Inc.,[23] involves an interesting problem as to when a person not a party to an action may intervene in an equity case. It was held that a third party may intervene in an equity case if he is able to show by his petition that he has an immediate legal or equitable interest in the property in the suit and that his interest is so involved therein that his title or right in such property will be jeopardized by a decree which the court might render in the case. But in this case, an interpleader suit by an escrow agent, who held in escrow money which represented agents' commissions on insurance written on property in Mississippi, against a non-resident corporate insurance agency and a resident insurance agent who disclaimed interest in the money, it was held that the state insurance commissioner was not entitled to intervene in order to present the contention that the arrangement regarding the division of commissions was illegal, since the state had no legal or equitable right to the money involved in this suit. It was claimed that an exception to the usual rule should be made in favor of the state and that the insurance commissioner should be allowed to intervene in order to bring a non-resident party thereto within reach of an injunction which was sought in the commissioner's petition, but the Court held that as there was no authority for allowing such intervention, no exception could be made even if it might prove salutary to do so in this case.

E. Mortgages

The case of *Jackson v. Holt*[24] held that where the owner of a 99-year lease, which had 13 years to run, conveyed the leased land by special warranty deed to a purchaser who executed a trust deed on the land to secure the purchase money, and the purchaser, who had knowledge at the time he purchased the land that he was acquiring only the unexpired lease, subsequently procured a new lease, the new lease inured to the benefit of the trust deed and was covered thereby. The Court distinguished this case from the cases where the vendor had no title to land purportedly sold and therefore conveyed nothing of value to the purchaser, in which cases the vendor is without equity because of lack of valuable consideration.

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[23] 7 So. (2d) 876 (Miss. 1942).
[24] 6 So. (2d) 915 (Miss. 1942).

The case of *Webb v. Biles*[25] involves a provision in a trust deed which reads as follows:

> "The said bank, or any holder of said indebtedness, if a person, acting personally, if a corporation, acting by and through its president, vice-president or secretary, or other managing authority, is hereby fully authorized and empowered to appoint another and succeeding trustee in place of the said above named trustee or his successors, if for any cause the trustee in this instrument, or his successors, shall not be present, able or willing to execute this trust, or if for any reason, said holders acting by and through the above described officers, or any one of them, should so desire, and such appointee shall have full power as trustee herein."

It was held that all ambiguities are to be resolved against the person for whose benefit the power is granted in construing provisions in a trust deed for appointment of a substitute trustee, and that the phrase, "or if for any reason, said holders acting by and through the above described officers, or any one of them, should desire, . . ." does not confer on an individual the power to substitute a trustee at his option, but that the phrase limits that right to corporate holders.

In the case of *Meyers v. American Oil Co.*,[26] it was claimed that since the mortgagor, who had given a deed of trust on certain land, did not obtain title to this land until a later date at a time when he was living on this land with his family as a homestead, that the deed of trust was void on the ground that his wife did not join in its execution; but the Court held that the grantor and all persons in privity with him are estopped from afterwards denying that at the time his deed was executed, he was seized of the property which his deed purported to convey, and that all mortgages and deeds of trust like the one involved are within this rule.[27]

In *Dana et al. v. Zerkowsky*,[28] it was held that where the guardian of an allegedly insane owner of realty and the owner individually were both made parties to a proceeding to foreclose a trust deed covering realty given by the guardian, and process was duly had upon all parties, the guardian's representation of the owner in a proceeding resulting in confirmation of a foreclosure sale and ratification of a deed would at least amount to representation of owner's right by guardian *ad litem* so as to render the question of the validity of title derived from the purchaser at the foreclosure sale *res judicata*.

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[25] 6 So. (2d) 117 (Miss. 1942).
[26] 5 So. (2d) 218 (Miss. 1941).
[27] MISS. CODE ANN. (1930) § 2125.
[28] 5 So. (2d) 423 (Miss. 1942).

F. Conditional Sales

The case of *General Motors Acceptance Corp. v. Shoemake*[29] held that the assignee of a conditional seller of a truck had a lien thereon and the right to the possession thereof, subordinate to liens for repairs if these repairs were reasonably necessary for the preservation and operation of the truck. In a replevin action against a repairman by the assignee of the conditional seller of the truck, a plea of not guilty was the only plea which the repairman was required to interpose,[30] and he could give evidence thereunder of his repairs and all facts that would sustain his claim to possession. Therefore, such a replevin action by the assignee of the seller would be *res judicata* in a later suit by repairman against the assignee to enforce a lien for repairs.

In the case of *American National Bank & Trust Co. v. Byrd*,[31] it was held that a plaintiff by making no objection to delay in the first five monthly payments on an automobile ratified that course of dealing and had no right to declare the entire indebtedness due and to demand payment therefor on account of delay in making the sixth monthly payment, when no notification had been given the defendant that such payment would be demanded on time. But it was also held that the judgment below for $500.00 punitive damages was excessive and the case was affirmed with remittitur. One of the judges dissented, and two of them dissented in part on the ground that appellee was not entitled to any punitive damages at all since it had filed suit on the advice of a reputable attorney who had merely made a mistake as to the cause of action.

The Court held in *Wells v. Bullock*[32] that where a conditional purchaser of a truck sold it to a third party, who delivered it to the conditional seller on demand, after which delivery the conditional purchaser paid the conditional seller the balance due, it was then the conditional purchaser's duty to redeliver the truck immediately and unconditionally to the third party; and, therefore, he could not require the third party to pay the balance of the purchase-money installments which were not then due.

G. Banks and Banking

The case of *Seward v. First National Bank in Meridian*[33] was an action against a national bank to recover loss of face value of county refunding bonds on ground that forged bonds were negligently accepted by the bank in exchange for plaintiff's old bonds and that the bank would have detected this forgery by exercise of reasonable care. The Court held

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[29]6 So. (2d) 309 (Miss. 1942).
[30]Miss. Code Ann. (1930) § 3097.
[31]191 Miss. 457, 3 So. (2d) 850 (1941).
[32]5 So. (2d) 686 (Miss. 1942).
[33]8 So. (2d) 236 (Miss. 1942).

that a bailee for hire is required to use only reasonable care and diligence in carrying out its contract of bailment in the absence of an express stipulation or statute to the contrary. Since there was no evidence to support the contention that reasonable care was not used, no recovery against the bank was allowed.

In *Merchants Bank & Trust Co. v. Walker,*[34] it was held that the statute[35] providing that a note given by a subscriber for stock in a corporation shall not be payment of any part of the capital stock of the corporation does not manifest a legislative intent to limit its application to stock issued by a corporation before it becomes a going concern; and, therefore, the statute applies to additional stock authorized and issued after the corporation gets in operation as a going concern. If the note given for the stock is secured by collateral other than the stock itself, the transaction is still illegal under this statute.

The case of *Banking Commission of Wisconsin v. Jacobson*[36] was an action brought by the Banking Commission of Wisconsin against Jean J. Jacobson to enforce an assessment made against stockholders of a delinquent Wisconsin bank. The Court held that a bank stockholder against whom an assessment is made must pay it, and if such assessment is unnecessary or excessive, the stockholder's complaint should be made before the banking authorities which have charge of the liquidation and which direct the application and distribution of the assets of the delinquent bank. The Court said that the reason for this rule was that stockholders frequently live in many different states; and, therefore, complaints should be made before the tribunal having charge of the liquidation so as not to cause excessive expenses of outside litigation and delay in its final termination.

Mayo Bros. Chemical Corp. v. Capital National Bank in Jackson[37] was a corporation's action against a bank for the bank's alleged negligence in paying to the corporation's sales manager the proceeds of a check drawn by the corporation, of which the bank was both drawee and payee. It was held that while a drawee bank acts at its own risk in paying to a third person the proceeds of a check payable to the bank's own order, the drawer also acts at its risk in clothing its agent with apparent authority to receive the proceeds of such check in cash. In this case, the evidence of the manager's apparent authority to cash checks warranted the finding that the bank was not negligent and did not breach any duty to the corporation in making payment to the manager who retained the proceeds of the check.

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[34] 6 So. (2d) 107 (Miss. 1942).
[35] MISS. CODE ANN. (1930) § 4148.
[36] 4 So. (2d) 537 (Miss. 1941).
[37] 5 So. (2d) 220 (Miss. 1941).

H. Miscellaneous

The case of *American Cotton Co-Op Ass'n v. Union & Warehouse Co.*[38] held that a warehouseman cannot escape the obligation imposed by statute[39] to cancel and take up negotiable warehouse receipts when the goods for which the receipts were issued were delivered by delegating the performance of this duty to another.

In *Burns v. Clarksdale Production Credit Ass'n.*,[40] the Court decided that a producer could not be deprived of his right to the proceeds of a subsidy check due him under the Cotton Price Adjustment Payment Plan for the 1937 Cotton Program by a determination of a county committee that the producer had forfeited this right to the mortgagee of his crops and livestock. This holding was on the theory that the producer had abandoned his crop, when producer was given no notice or opportunity to be heard in regard thereto as provided by statute.

The case of *Smith v. J. P. Seeburg Corp.*[41] involved the determination of whether an Illinois corporation was "doing business" in Mississippi[42] so as to be precluded from suing to foreclose a chattel mortgage because it had not appointed a resident agent or filed a copy of its charter as required by statutes.[43] It was held that since the Illinois corporation sold its phonograph instruments through a Texas distributor and since its business was interstate in character, it was not "doing business" in Mississippi within the meaning of the statute. The fact that its distributor by its own independent action undertook to service the instruments and performed its agreements did not subject the Illinois corporation to the Mississippi statute requiring certain acts of corporations doing business within this state.

In *Mengel Co. v. Ishee*,[44] an employee's action for overtime and liquidated damages under the Fair Labor Standards Act[45] of 1938, the Court held that an action under this act was within the concurrent jurisdiction of state and federal courts, and the employer had a right to remove the action which was brought in the state court to the federal court.

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[38] 7 So. (2d) 537 (Miss. 1942).
[39] Miss. Code Ann. (1930) § 3491.
[40] 5 So. (2d) 10 (Miss. 1941).
[41] 6 So. (2d) 591 (1942).
[42] *See* Note, *When Is A Foreign Corporation "Doing Business" in Mississippi?* (1941) 13 Mississippi Law Journal 548.
[43] Miss. Code Ann. (1930) § § 4140, 4164.
[44] 4 So. (2d) 878 (Miss. 1941). For criticism of this case *see* Poole, *Private Litigation Under the Wage and Hour Act* (1942) 14 Mississippi Law Journal 157, 159.
[45] Fair Labor Standards Act of 1938, § § 1-19, 13(a)(11), 52 Stat. 1060-1069 (1938); 29 U. S. C. A. § § 201-219, 213 (a) (11) (1942).

In *National Cash Register Co. v. Giffin,*[46] the seller of a cash register brought suit to recover the unpaid purchase price. The Court held that when the buyer plead the affirmative defense of settlement and release through an authorized agent of the seller, the burden was upon the buyer to show the fact of agency, adequate authority, and the act of settlement and release.

The case of *W. T. Rawleigh Co., Inc. v. Wing*[47] held that where sureties signed a bond agreeing to pay the seller for any goods sold the principal, this bond, which expressly covered all prior indebtedness that might be due and owing the seller by the principal on transactions occurring prior to its execution, covered the balance due seller on transactions previous to the execution of the bond even though the sureties may not have known that such prior indebtedness existed.

It was held in the case of *Stephens v. Stephens*[48] that an instrument entitled "Joint account—Payable to Either or Survivor", signed by spouses and delivered to a bank, stating that all funds deposited in this account were spouses' joint property which was owned by them as joint tenants with the right of survivorship and not as tenants in common, clearly showed the intention of the parties to the instrument; and, therefore, upon the death of the husband, the wife as a joint tenant with right of survivorship was entitled to the balance of the account as against the executors of her husband's estate.

McNair et al. v. M. L. Virden Lumber Co., Inc.[49] involves the interpretation of Section 2274, Code of 1930, providing that subcontractors, journeymen, and laborers may bind the amount due the contractor by written notice to the owner of their claims. It was held that one notice to the owner of a claim against the contractor stopped the right of the owner to pay the contractor the amount claimed in that notice; and if other claimants in the same class subsequently gave notice to the owner of their claims, or if they asserted their claims in court, in a suit to which the owner was a party, at a time before the owner had paid out funds which he had when the first notice was received, all such claimants should share ratably in such funds. Under the old law pertaining to a situation of this kind, if one claimant gave his notice a minute prior to another claimant, the first claimant was entitled to all of his money before the others were entitled to anything; and priority of payment was based on priority of notice. Section 2274, Code of 1930, is an amendment of Section 3074, Code of 1906; and it would seem that the present law offers a fairer and more convenient method of settling the rights of the parties in a case of this kind.

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[46] 6 So. (2d) 605 (Miss. 1942).
[47] 4 So. (2d) 222 (Miss. 1941).
[48] 8 So. (2d) 462 (Miss. 1942).
[49] 4 So. (2d) 684 (Miss. 1941).

II.

CRIMINAL LAW

*J. P. Coleman**

Notwithstanding the decline of prohibition in the United States at large, to say nothing of its reported lack of enforcement in some parts of our State, a large percentage of the cases decided by the Supreme Court of Mississippi in the 1941-1942 term involved violations of the law against intoxicating liquor. This indicates, of course, that a vigorous effort is being made by officers in some sections of the State to execute these regulations.

A. Intoxicating Liquor

(1) *Searches and Seizures*

The favorite ruse of the roadhouse operator who sells liquor, and of bootleggers who operate from a fixed place of business, has been to lease a small tract, usually one acre or less, alongside a highway; place a building on it; conduct liquor sales from that house, usually very poorly camouflaged as a grocery or filling station; while the liquor was kept just over the property line on neighboring premises.

This shallow arrangement was torpedoed for all time to come by the holding of the Court in the *Brown* case[1].

The liquor was found near the residence of the appellant but on land belonging to another, not described in the search warrant under which the officers were making the search.

The liquor was found in the pasture of a neighbor, near the residence of the defendant. A well defined path led from his back door, through a fence, to the liquor. Conviction was affirmed.

It was held that no constitutional right of the appellant against unreasonable search and seizure, as defined by Section 23 of the Constitution of 1890, was violated unless the houses and possessions searched were the property of the person complaining or unless he was entitled to or was exercising possession thereof under such circumstances as to make him the owner for the time being.

In a dissenting opinion, Anderson J., seems to feel that any premises being used by a defendant in violation of the law should be covered by a search warrant so as to avoid questions of ownership or possession of property in criminal trials. He stated, however, that he knew of no de-

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*District Attorney, 5th Circuit Court District: Ackerman, Mississippi.
[1]Brown v. State, 5 So. (2d) 426 (Miss. 1942).

cisions of our Court on the point. As a suggestion to officers, this should help them smooth the path of prosecution, but under the majority opinion the violator will no longer be able legally to hide behind his neighbor's property.

(2) *Evidence Sufficient to Sustain Conviction*

In *Williamson v. State*[2] the defendant was the husband and father of the family, consisting of his wife, her two sons, 15 and 18 years of age, by a previous marriage, and two daughters. The wife was operating a restaurant in the village of Lena, in Leake County. The husband was a carpenter. On the morning of the search he had returned home, after an absence of three weeks. He had been in Lena about an hour before the search was made. Thirty-three half-pints of whiskey and sixteen pints of wine were found in the defendant's home, to which he furnished the officers the key. The whiskey was in a locked trunk. The defendant denied any knowledge of the presence of the liquor in his home previous to the search and appealed from the conviction on the ground that the verdict was contrary to the overwhelming weight of the testimony. The Court was evenly divided, and the conviction was upheld by a tie vote of the justices. The prevailing opinion was based on the rebuttable *prima facie* case established against the defendant by the presence of the liquor in his house, he being the responsible head of the house and in control of the premises. Dissent from the affirmance was based on the proposition that the *prima facie* case had, without conflict in the evidence, been overcome.

The rule of the *prima facie* case against the husband and responsible head of the house was thereafter upheld, without dissent, in an opinion written by one of the dissenting justices in the *Williamson* case.[3] In the *Quick* case,[4] the daughter announced the approach of four officers intent upon searching the home for intoxicating liquor. She ran into the house, where her father was seen, in a back room, to throw a loose coat around her. She then went out and seated herself on the front porch. The Sheriff saw the print of a bottle under her coat and put his hands on the bottle. He then "pulled that smock back" and took two half pints of liquor out of a special jacket that the girl was wearing under the smock. Under the rule of the *Williamson* case,[5] the conviction of the father was affirmed.

Later, the conviction for the unlawful possession of intoxicating liquor of Leitha Aultman, wife of Marshal Aultman, was reversed, the conviction of her husband upheld, the Court saying that there was no substantial evidence of the wife having any part in or knowledge of the possession.[6]

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[2]191 Miss. 664, 4 So. (2d) 220 (1941).
[3]*Ibid.*
[4]Quick v. State, 4 So. (2d) 887 (Miss. 1942).
[5]Williamson v. State, 191 Miss. 664, 4 So. (2d) 220 (1941), cited *supra* note 2.
[6]Aultman v. State, 8 So. (2d) 453 (Miss. 1942).

In *Leggett v. State*[7] the defendant was seen going to and from a place near a fence; he was seen to reach through the fence at this point and deliver something to the occupants of automobiles who visited the premises. The officer then found a milk can near this point containing sixteen pints of liquor. Conviction was affirmed.

(3) *Evidence Insufficient to Sustain Conviction*

The opinion in *Sanders v. State*[8] deserves a place among the classics of the Bar. The convicted negro was an invitee of a truck driver on a trip from Hazlehurst to Vicksburg. He first learned on the return trip that the object of the journey was to transport Paul Jones and Hiram Walker from Vicksburg to Hazlehurst. It seems from the evidence, cleverly recited in the opinion, that the defendant, without the knowledge of his wife, had carried along a woman friend. He offered one of the arresting officers $200 to let the woman friend go. This was held by the Court to have been caused by the fear of punishment from an outraged wife, rather than evidence of guilty knowledge of the transportation. The opinion, with great facility of narration, in splendidly chosen language throughout, wittily and humorously analyzes the efforts of various counsel to uphold certain precepts or concepts of probable and proper husbandly behavior when about to be caught "foolin' around".

Legally, the opinion is another precedent that it takes more than mere presence and approval to connect one as a participant in crime. The defendant was discharged from his liquor conviction, but nothing is known of the outcome of the conviction he doubtless suffered at the bar of the summary court quickly convened by his angry wife.

(4) *Procedure*

In *Singleterry v. State*[9] the Court announced its decision to follow the restrictions placed by it on third offense liquor prosecutions in the *Millwood* case[10].

In *McDaniel v. State*[11] the defendant moved the court to require the prosecuting attorney to furnish the names of the witnesses intended to be introduced in behalf of the State and the time and place of the alleged liquor sale. The Court re-affirmed its strongly established rule that the defendant in criminal cases is not entitled to a bill of particulars, nor is the State bound to furnish the defendant with the names of the State witnesses.

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[7]191 Miss. 649, 4 So. (2d) 234 (1941).
[8]6 So. (2d) 125 (Miss. 1942).
[9]4 So. (2d) 234 (Miss. 1942).
[10]Millwood v. State, 190 Miss. 750, 1 So. (2d) 582 (1941).
[11]191 Miss. 854, 4 So. (2d) 355 (1941).

B. Reasonable Men Engaged in Search for Truth

In *Truckers Exchange Bank v. Conroy*[12] and *Jakup v. Lewis Grocer Co.*[13], the Supreme Court has clarified its requirements for directed verdicts in civil cases.[14]

Upton v. State[15] was the first case in which criminal prosecutions were explicitly brought within the same rule, soon re-iterated in *Ashford v. State*[16]:

". . . whether reasonable men, engaged in a diligent search for the truth, uninfluenced by improper motives or consideration, could safely accept and affirmatively act on the evidence produced, taking it as a whole, is so doubtful that another jury should be permitted to pass thereon."[17]

It would appear to the writer that if the testimony for the State and defendant is in conflict the application of this rule at once converts the Supreme Court into a jury. In a majority of the cases, however, the Court has been very helpful by fully detailing the testimony and the considerations which caused the application of the rule.

The Court has gone further than a remand in the application of this rule (in *Lyle v. State*[18]) and discharged the defendant because he was convicted on the testimony of an accomplice, that testimony being described as "improbable, self-contradictory, unreasonable and impeached by unimpeached witnesses."[19]

Those seeking to invoke the protection of this rule had best keep in mind the statement in *Prine v. State*[20] that whether defendant is entitled to a directed verdict of not guilty will not be passed on when not raised in the court below.

C. Homicides

The defendant in *Merikle v. State*[21] was engaged in an effort to release a prisoner from the Greene County jail. A doctor, encountered in the sheriff's office, was shot in the back while trying to escape. The conviction was affirmed, and the writer of the opinion carrying the death penalty said that:

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[12]190 Miss. 242, 250, 199 So. 301 (1940).
[13]190 Miss. 444, 200 So. 597 (1941).
[14]For discussion of directed verdicts *see* Note, *When May the Court Direct A Verdict in Mississippi?* (1940) 12 Mississippi Law Journal 350.
[15]6 So. (2d) 129 (Miss. 1942).
[16]6 So. (2d) (471) (Miss. 1942).
[17]*Id.* at 472.
[18]8 So. (2d) 459 (Miss. 1942).
[19]*Id.* at 461.
[20]7 So. (2d) 255 (Miss. 1942).
[21]8 So. (2d) 454 (Miss. 1942).

"Had the jury done less it would have aroused the suspicion that they had not the fortitude to do their duty."[22]

In *Prine v. State*[23] the son was attempting to kill the deceased, but the father came up and actually committed the murder. There was little, if any, evidence tending to show that the killing was the result of pre-arrangement between father and son. On a separate prosecution, it was held that the son could not be convicted of murder. Possibly he should have been prosecuted solely for an attempt.

In *Jones v. State*[24] the evidence was held, in a one sentence opinion with no reasons given, to be insufficient to sustain a conviction of more than manslaughter. The case was reversed and remanded.

One death sentence was affirmed without detailed written opinion,[25] and two other death sentences were upheld after a careful analysis of the facts upon which the convictions were predicated.[26]

(1) *Culpable Negligence Cases*

In *Cutshall v. State*[27] the appellant was convicted of manslaughter predicated on alleged culpable negligence in the operation of a motor truck. The Court held that while the driving of an automobile when under the influence of intoxicating liquor is a misdemeanor, this does not mean that such evidence constitutes a *prima facie* case of manslaughter under the culpable negligence statute. Quoting what may be considered to be the key sentence of the opinion: "It is not the fact but the effect of the intoxication which is relevant."[28] It is proper to show that the defendant at the time was intoxicated, but the culpably negligent conduct growing out of the intoxication must also be shown beyond a reasonable doubt and it must be the proximate cause of the death. Both the majority and dissenting opinions agreed that the evidence presented an issue of culpable negligence. An instruction, set out in the opinion, referred to driving while intoxicated as being, itself, a violation of the laws of this State, and the giving of the instruction was held to be reversible error.

The Court held in a similar case, *Brooks v. State*[29], that there had been no error in instructions, but the Court divided three to three on whether the evidence established culpable negligence, this division resulting in the conviction being affirmed.

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[22]*Id.* at 455.
[23]7 So. (2d) 255 (Miss. 1942), cited *supra* note 20.
[24]6 So. (2d) 304 (Miss. 1942).
[25]Yount v. State, 4 So. (2d) 496 (Miss. 1941).
[26]Wright v. State, 8 So. (2d) 455 (Miss. 1942); Flemings v. State, 8 So. (2d) 457 (Miss. 1942).
[27]Cutshall v. State, 191 Miss. 764, 4 So. (2d) 289 (1941).
[28]*Id.* at 773, 4 So. (2d) at 292.
[29]4 So. (2d) 886 (Miss. 1941).

In *Lee v. State*[30] the Court sets out in detail the instructions obtained by the State. These instructions are held to be subject to adverse criticism, if not condemned as error. The conviction was affirmed because the defendant had obtained two instructions emphasizing the law as defined in the *Cutshall* case.[31] The Court, at this term, has definitely put the Bar on notice of the law of homicide in culpable negligence cases.

D. Contempt of Court

In *Estes v. State*[32] the defendant was a defense witness in a criminal prosecution and was vigorously cross-examined by the district attorney. While in the act of retiring from the witness stand, he threatened the prosecutor. His 30-day sentence for contempt of court was upheld in an opinion that sets out the information filed against the defendant and most clearly defines contempt of court as applied to word or conduct which impedes, embarrasses, obstructs, defeats, or corrupts the administration of courts of justice, or which to a substantial degree is calculated to do so or which tends to do so.

E. Larceny

Alford v. State[33] was a case involving the conviction of a President of a County Board of Supervisors for grand larceny. The evidence as to fraudulently obtaining and cashing a county warrant is set out in full in the opinion, and the Court found it to be governed by the familiar rule that where one is induced by fraud to relinquish his title to property and the possession thereof, the person so obtaining the goods may be chargeable with a common law cheat or false pretenses but not with larceny.

F. Weapons

The defendant was convicted, in *Austin v. State*[34], of unlawfully and intentionally pointing and aiming a gun at and toward another, not in self defense or in lawful discharge of official duty. The evidence showed that the defendant went into his house, obtained a gun, came out on the front porch and in a scuffle with his wife over the weapon was prevented by her from raising it to a position where it could be either pointed or aimed at anyone. The Court held that the defendant might have been convicted of an attempt to commit the offense charged, but not of the offense itself.

G. Insulting Words Justifying an Assault

In *Baker v. State*[35] the defendant was convicted of assault and battery. The conviction was affirmed in a very interesting opinion dealing with the

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[30]7 So. (2d) 875 (Miss. 1942).
[31]Cutshall v. State, 191 Miss. 764, 4 So. (2d) 289 (1941), cited *supra* note 27.
[32]6 So. (2d) 132 (Miss. 1942).
[33]8 So. (2d) 508 (Miss. 1942).
[34]6 So. (2d) 121 (Miss. 1942).
[35]6 So. (2d) 315 (Miss. 1942).

defendant having pleaded self-defense in his testimony and also attempting in a requested instruction to set up justification because of insulting language. The Court held, "Words do not of themselves justify assault; a defendant must justify the assault by the words."[36]

H. Affidavit

An affidavit is prerequisite to prosecution in Justice of the Peace Court. Where there is a conviction in Justice Court on an alleged affidavit that was not signed or sworn to until after conviction, the Circuit Court has no jurisdiction.[37]

I. Venue

In a County with two circuit court districts, proof that the crime was committed "in the Second District of Tallahatchie County, Mississippi" was sufficient to establish venue in the Second Circuit Court District of that County and State.[38]

J. Evidence

The confession of the defendant that he was the driver of the car plus the undisputed testimony of his own witness that the defendant was the driver of the automobile a few miles from the scene of an accident was held to be sufficient to establish the *corpus delicti* in a case where the defendant was charged with driving while intoxicated.[39]

In *Wilson v. State*[40] the six defendants were imprisoned in the upper story of the county jail, alone and in the nighttime, immediately following their arrest for being drunk. One or more of them broke out the panes of the windows, removed brick from the wall, flooded the floor with water, put the bedding in the water, and broke the dishes. They were all tried jointly and convicted. No one of the six was seen by any eye witness to do any of the destruction. The defendants were discharged because there was only circumstantial evidence of their guilt and to convict any one of them it was necessary that the evidence show that particular defendant guilty beyond every reasonable doubt and to the exclusion of every other reasonable hypothesis.

K. Instructions

The defendant in *Easter v. State*[41] was convicted of manslaughter for a death caused in an automobile accident. The testimony for the State and defense concerning the speed of the appellant's car and the position of the other car on the roadway was seriously conflicting.

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[36] *Id.* at 316.
[37] Bramlette v. State, 8 So. (2d) 234 (Miss. 1942).
[38] Huffman v. State, 6 So. (2d) 124 (Miss. 1942).
[39] Henley v. State, 4 So. (2d) 543 (Miss. 1941).
[40] 6 So. (2d) 607 (Miss. 1942).
[41] 191 Miss. 651, 4 So. (2d) 227 (1941).

In this state of the evidence the trial court refused the instruction commonly known to all prosecutors (and, in fact, to defense attorneys also) as "the sinker instruction." The instruction is set out in the majority opinion, as follows:

"The Court instructs the jury for the defendant that it is the duty of each and every member of the jury in this case to decide the issues presented for himself, and if, after consideration of all the evidence in the case and the instructions of the court on the law, and from consultation with his fellow-jurors, there is a single juror who has a reasonable doubt of the defendant's guilt, it is his duty, under his oath, to stand by his conviction and favor a verdict of not guilty so long as he entertains such a doubt."[42]

The Court held the refusal of this instruction where there is a serious conflict in the evidence to be reversible error.

There was a powerful dissenting opinion, joined in by one other member of the Court, in which the instruction was condemned for shifting "the emphasis from the need for agreement to an invitation to disagreement"[43] and further that "the form of the instruction should be limited to the legal requirement of unanimity without excursion into the moral duties resident in the conscience of the jurors nor into the possibilities incident to corruption".[44]

The role and function of the "presumption of innocence" in criminal prosecutions, is well defined in *Carr et al. v. State*.[45]

In *Smith v. State*[46] the defendant was convicted of murder. Two instructions were given for the State which repeatedly had been held to be erroneous and a third instruction was also plainly erroneous. The defense was self-defense. The Court held that there was no substantial basis in the record for any reasonable apprehension on the part of the defendant that he was in any real danger of suffering death or great bodily harm. The defendant had received liberal instructions. The Court reached the conclusion that:

> ". . .had the erroneous instructions not been given, no impartial jury composed of men of sound judgment, duly mindful of the obligation of their oaths, would have reached any other verdict under the facts of this case. . ."[47]

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[42] *Id.* at 654, 4 So. (2d) at 228.
[43] *Id.* at 655, 4 So. (2d) at 228.
[44] *Id.* at 658, 4 So. (2d) at 229. See Alexander, *The State Also is Entitled to A Fair Trial* (1940) 12 MISSISSIPPI LAW JOURNAL 265, 268.
[45] 4 So. (2d) 887 (Miss. 1941).
[46] 6 So. (2d) 134 (Miss. 1942).
[47] *Id.* at 135.

The verdict was sustained, regardless of the errors in the instructions, and the writer submits that this rule is as appropriately applied in behalf of the State as is the similar rule on directed verdicts for defendants. On this theory, it was held in *Fugler v. State*[48] that the giving of the outlawed *"falsus in uno"* instruction was harmless error for the reason that there is not even a probability on the evidence that without the instruction any fair minded jury would have rendered a more favorable verdict.

In *Hodges v. State*[49] the Court reversed the conviction for manslaughter, under an indictment for murder, because the defendant's version of the killing was that she cut the deceased while he was attempting to commit a statutory offense against her person, whereas, the State's instructions limited self-defense to reasonable apprehension of death or great bodily harm, leaving out the right to protect her person against the commission of the threatened felony.[50]

L. Witnesses

The defendant in a murder prosecution offered to introduce twenty witnesses who would testify that his reputation for peace and violence was good. The district attorney stated that he did not intend to challenge appellant's character. The trial court limited the number of character witnesses to six. No error.[51]

M. Sentence

Little was convicted of the unlawful possession of intoxicating liquor. He was fined $500 and sentenced to 120 days imprisonment. This was 30 days in excess of the maximum provided by statute.[52] It was held that the trial Court intended to impose the maximum penalty. It was reduced to the maximum allowed by statute.[53] Two justices were of the opinion that the case should be remanded to the court below for proper sentence.

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[48]7 So. (2d) 873 (Miss. 1942).
[49]6 So. (2d) 123 (Miss. 1942).
[50]Miss. Code Ann. (1930) § 988 (f).
[51]Fugler v. State, 7 So. (2d) 873 (Miss. 1942), cited *supra* note 48.
[52]Miss Code Ann. (1930) § 1974.
[53]Little v. State, 8 So. (2d) 464 (Miss. 1942).

III.

PLEADING, PRACTICE AND PROCEDURE

*John C. Stennis**

A. Pleadings at Law

(1) Amendments in Replevin

An important decision in replevin law is *Grissom v. General Contract Purchase Corporation.*[1] The declaration was for possession of an automobile; process was served personally on defendant but no property was found. Plaintiff's attorney, without amending his declaration, announced orally in open court that he elected "to declare and prosecute the action for recovery of the value of the property in suit as provided by Section 3095, Code 1930." A writ of inquiry was allowed and judgment given on a jury verdict which fixed the value of the property in suit; the defendant did not appear but appealed. The court held that in replevying, the declaration is due after the return and should be drawn in the light of the facts disclosed by the return. If the declaration is for possession, an amendment is necessary before the case can be prosecuted for value in the event no property is seized. "To declare", in pleading, means to state by declaration the cause of action. The Court said the defendant might have elected to stand judgment for possession but not for the value. For the lack of a proper amendment, the case was reversed. It seems a proper amendment would also have required additional process or notice to the defendant.

(2) Motions for Change of Venue

A splendid case during the term on venue is that of *Howard v. Ware.*[2] Suit was filed in the Circuit Court of W county against A, a corporation domiciled in W county, and against B, a resident of S county. The declaration alleged the facts showing liability on both defendants. B moved for a change of venure to the county of his residence. S county, and alleged that A was joined as a defendant merely to confer jurisdiction in W county. This motion was overruled. Plaintiff's proof failed to show any liability on A; thereupon B renewed his motion for a change of venue, the motion being overruled again. The case proceeded to judgment against both defendants and B appealed. The burden of showing the falsity of the allegations of the bill on the hearing of the motion was declared by the court to be on the movant. When plaintiff's completed proof failed to show any liability on A, and B renewed his motion for a change of venue, the motion should have been sustained. The Court thus announced the clear-cut rule that venue should be changed on request of the party entitled thereto whenever the condition therefor arises regard-

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*Circuit Judge, 16th Judicial District; De Kalb, Mississippi.
[1]191 Miss. 742, 4 So. (2d) 303 (1941).
[2]192 Miss. 36, 3 So. (2d) 830 (1941).

less of the then state of the trial, providing the party has not waived it. And the point is not waived by the filing of a plea to the merits after the motion is once overruled.

The court discussed the question of whether or not the error in refusing the change of venue was cured by the introduction of evidence by defendant B that tended to show liability on A, but held this evidence was also insufficient to show liability and left the question undecided. The general rule established in this case is analagous to the rule as to the removal of causes to the federal court.

B. Pleadings in Chancery

(1) Chancellor's Findings of Fact

In *Hubbard v. Massie,*[3] there was no transcript of the evidence in the Supreme Court, but there was the Chancellor's special finding of facts made on request of the parties and embodied in the record as provided by Chapter 252, Laws of 1934. On the question of whether or not the court should consider said findings as the facts of the case, it was held that originally a finding of the leading facts were always included as a part of the chancery decree but came to be omitted in practice, thus causing the statutory enactment. When the findings are incorporated in the decree, or are made a special finding under the statute, they, thereby, become a part of the record, with the presumption of correctness, which prevails in the absence of a transcript of the testimony. The fact that a period of only ten days is allowed to give notice to transcribe notes, and far more time is allowed for an appeal, and that a successful party in the lower court may be cut off without benefit of the transcribed notes, was held, if a defect, a matter for legislative correction. Each side could well be allowed ten days after an appeal bond is posted to give notice to the court reporter.

(2) Venue in Attachments

An interesting and valuable case on attachments, garnishments, and venue was decided in *Gulf Refining Co. v. Mauney.*[4] An attachment suit was filed in chancery in P county against one non-resident defendat, two resident defendants of T county, where the alleged injury occurred, and a resident of P county who was alleged to possess property belonging to the non-resident defendant. The complaint and process described the resident defendant of P county as a garnishee; this defendant answered and admitted having property of the non-resident defendant in his possession. All other defendants sought to defeat the venue of P county on the grounds (1) that the residence of the garnishee defendant does not de-

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[3]192 Miss. 95, 4 So. (2d) 494 (1941).
[4]191 Miss. 526, 3 So. (2d) 844 (1941).

termine the venue of a suit because he is not a necessary party; and (2) that the garnishee defendant was not properly described in the bill nor in the process and hence was not legally in court.

The Court held that in attachments in chancery under Section 173, Code of 1930, the resident defendant alleged to have property of another defendant in his possession is not a garnishee and no such writ should issue for him. He is simply a defendant, with all rights and privileges as such; and in this case, as he had the property of the non-resident defendant in his possession, he was a necessary party within the provisions of Section 363, Code of 1930. His residence would therefore fix venue in P county. The Court expressly refused to rule on the effect of the incorrect process as the resident's actual appearance and answer cured all defects, if any. In attachments at law, the proper court of garnishee's residence, if there be an indebtedness due the non-resident defendant, has jurisdiction in a suit against a principal defendant who is a household resident of another county. Section 495, Code of 1930, on change of venue does not apply.[5]

C. Process

(1) Attachments

In *Barbour v. Stevens*,[6] an attachment at law by an indorser against non-resident makers of a promissory note for reimbursements for sums paid on the note, publication of summons on February 20th and 27th, and March 6th and 13th was sufficient compliance with Section 137, Code of 1930, and was sufficient process to make the March term of court which conveyed on March 17th, the appearance term, and also sufficient to support a judgment by default at the next regular term. The last publication was less than 5 days prior to the first day of the term, but more than 21 days had elapsed since the first publication and under Section 2972, Code of 1930, the defendant "may be proceeded against as if he had been served personally for 5 days, previously to the date of completion of said publication, with a summons in the case in this state."

The declaration alleged that defendants were operating a drilling enterprise as partners and that one partner, acting for himself and the others, procured the indorsement. There was no allegation that this partner's act was with the authority, knowledge, or consent of the others, or that the money was borrowed for use in the alleged business. It was held that these facts constituted only a joint adventure, and not a general trading or commercial partnership. There was therefore no implied authority of one alleged partner to bind the others in executing a note, and no such power was alleged in the bill; hence the declaration would not support a default judgment.

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[5]Smith v. Mulhern, 57 Miss. 591 (1880); Baum & Co v. Burns, 66 Miss. 124, 5 So. 697 (1888).

[6]8 So. (2d) 242 (Miss. 1942).

(2) Juvenile Hearings for Committment

Maddox v. Bush,[7] a hearing before the Chancellor, involved the petitioner, a minor who was committed to the Industrial Training School. Process therefor was served on the father, and the custodians of the minor, but no process was served on the minor, nor was there proof that the minor was present. In a *habeas corpus hearing* by the minor, it was held that although Section 7252, Code of 1930, did not expressly require any process on the minor, no judgment is binding on a party who had no notice. The Court said:

> "It is not in the power of the legislature, under our Constitution, to dispense with this notice, actual or constructive."[8]

The Court intimated that even if the minor had been shown to have been present, the same result would follow as the matter was jurisdictional. Section 7260, Code of 1930, authorizes committals to the Industrial School of any child convicted of a crime involving moral turpitude. This is a mere matter of sentence, jurisdiction and notice being obtained through the criminal proceeding.

Chapter 300, Laws of 1940, the Juvenile Act, at no place requires process to be served on the minor, but contemplates that "the child shall be brought before the court." Under the *Bush* Case, unless jurisdiction is obtained through a criminal proceeding, process on the minor is absolutely essential.

D. Limitation of Actions

In *State to use of Rogers v. Newton,*[9] the old question of remedial and penal statutes was brought sharply to the front by a divided court in this case; and the old tests were reaffirmed. A statute that grants a theretofore non-existent remedy for a wrong is remedial; one that makes a wrongdoer liable to the wronged person for a fixed sum regardless of the injury actually inflicted is penal. The latter is not assignable and has a one-year limitation for suit. A majority of the Court held that the statute making a county superintendent of education liable to the holder for the face value of unauthorized pay certificates was penal, and hence action thereon was barred in one year.[10]

Another important case distinguishing between remedial and substantive law is *Montgomery v. Yarbrough,*[11] wherein an indorser was sued on a note executed and delivered in Alabama. Partial payments were

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[7]191 Miss. 748, 4 So. (2d) 302 (1941).
[8]*Id.* at 750, 4 So. (2d) at 303.
[9]191 Miss. 611, 3 So. (2d) 816 (1941).
[10]Miss. Laws 1936, c. 255, § 4.
[11]192 Miss. 656, 6 So. (2d) 925 (1942). *See* Note, *Foreign Statutes & Limitation in the Mississippi Courts* (1941) 13 Mississippi Law Journal 619.

made thereon, which, under the Alabama law, operated in law as a new promise and thereby extended the due date of the note. More than six years had elapsed from the original due date of the note until suit was filed. It was stated by the court that the 6 year statute applies from the original maturity date. The law prescribing the manner in which a new promise tolling a statute of limitations shall be made, or shall be implied, relates to the remedy. The *lex fori* therefore controls, and Section 2318, Code of 1930, which requires a "writing signed by the party chargeable thereby" is applicable.

An interesting case on the interpretation and application of an administrative statute is *Fuqua v. Board of Supervisors of Itawamba County.*[12] More than six years after the certificates were due, plaintiff petitioned for a writ of mandamus to require the Board of Supervisors to issue bonds to take up certain teacher certificates as provided by the express mandatory provisions of Section 5977, Code of 1930. On the question of whether or not the claims were barred by the statute of limitations, it was held, that the far-reaching provisions of Section 5977, Code of 1930, requiring the Board to issue bonds to pay such obligations were nevertheless subject to Section 2291, Code of 1930, providing a claim shall be barred 6 years after the plaintiff had a right to demand payment. The fact that the demand was to be paid from a special fund is not controlling.

In *Board of Supervisors of Prentiss County v. McRee,*[13] it was held that Section 15, Chapter 255, Laws of 1936, waived the statute of limitations by inference and claims otherwise barred could be paid from the county school fund; the latter law was a special act and applied only to claims outstanding "on the date of the approval of this act."

In *U. S. Fidelity & Guaranty Co. v. Ransom,*[14] plaintiff obtained a judgment against defendant in another state on July 7, 1930. Defendant became a resident of Mississippi in September, 1937. In August, 1939, this action was begun on the judgment and defendant plead the 7-year statute of limitations. Plaintiff contended that the time defendant was outside Mississippi should not be included. The time that will be excluded is the time a defendant is out of the the state *after* a cause has accrued against him *here.* The time defendant was beyond this state was prior to the accrual of a right here. Under the facts the 7-year statute applied and defeated recovery.

E. Trial

(1) Summons

That the purpose of a summons is to get a person to court, and if this purpose is served, all errors therein should and do fall by the wayside so

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[12]192 Miss. 6, 4 So. (2d) 350 (1941).
[13]185 Miss. 726, 189 So. 95 (1939).
[14]192 Miss. 286, 5 So. (2d) 238 (1942).

far as jurisdiction is concerned, is illustrated by the case of *Amis v. Home Owners' Loan Corporation.*[15] This is a case wherein there was a defect in the service of process on two justices of the peace who were summoned by another to comprise a court of unlawful entry and detainer. The service was defective but the justices appeared; their appearance and the fact they organized the court, gave jurisdiction of the subject-matter, and therefore the court to which the appeal was taken had jurisdiction. The defective service would have merely excused the justices from a penalty had they not appeared.

(2) Non-residents

Another case has been handed down on the mixed question of law and fact as to just when a person becomes a non-resident after being a resident of this state. In *Bonds v. Ross,*[16] a suit in attachment, it was held that one formerly residing in this state becomes a non-resident under our attachment statute when he removes from the state intending to remain out permanently or for a definite period of time, and that this is true even though he makes daily visits, in the line of his work, to his former home town in this state. To rent out his home in Mississippi, to another and move to Tennessee, and rent a home there with the evident purpose of remaining there indefinitely, is to become a citizen of Tennessee regardless of how often he may return to or visit his former home town here.

(3) Effect of Agreed Continuances

In *Wooley Electric Co. v. Stanford,*[17] a claimant's affidavit to property in litigation (presumably in garnishment but the facts do not make this clear) was filed by a third person at a term of court and by agreement of all parties that phase of the case was continued for the term, but nothing definite was said as to when issue on said claimant's affidavit might be made up; no issue was made up at that term. Objection was made at the next term to the court permitting the adverse party to make up an issue on the claim. The Court held that unless expressly covered by a statute, such issues can be made up at such time as the court, in its discretion, may order. In any event, as to this case, the agreement for a continuance of this branch of the case carried with it by implication the right of all parties to do at the next term all things they could have done at the former term, and the right to make up the issue was extended to the deferred term.

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[15]192 Miss. 309, 5 So. (2d) 425 (1942).
[16]192 Miss. 610, 7 So. (2d) 554 (1942).
[17]6 So. (2d) 318 (Miss. 1942).

(4) Judicial Notice of Other Cases

Complainant's suit in *Bridgeman v. Bridgeman*[18] was based on a prior suit in the same court, the pleadings or decree of which were not attached to the complaint in this suit, nor set forth therein except by the reference, "all of said papers in said cause are referred to and made a part hereof as exhibits hereto as fully as if set out herein in words and figures." Defendant filed no pleading, and did not appear in the trial court, but appealed from a final decree asserting the complaint stated no cause of action.

The Court announced that at common law exhibits annexed to and filed with a complaint could not be considered as a part thereof, but under Section 374, Code of 1930, exhibits filed with a bill are considered as if copied therein; but in order to come within the statute, the exhibits must be "filed with the bill." Trial courts cannot, in deciding a particular case, take judicial notice of what was done in any other case, even in the same court in order thereby to supply missing facts *essential* to the support of the particular case. This is just another sound application of the old rule that facts essential to recovery must be pleaded. In *Illinois Central R. R. v. Walker,*[19] it was held that a trial court could not take judicial notice of the ownership of a railroad proven in another case growing out of a different transaction. These were essential matters. On the other hand, as to merely related matters, it was held in *McCandliss v. Clark,*[20] that where cases in the same court were interwoven and interdependent, in the trial of one the court will take judicial notice of the proceedings in the other, even if the parties are not the same.

(5) Instruction

In *Illinois Central R. R. v. Woods,*[21] the jury was instructed that there could be no recovery for punitive damages. The verdict was for the plaintiff in the sum of $1500. Defendant appealed but there was not a cross-appeal by plaintiff. As there was no cross appeal by the plaintiff, the Court declined to rule on the correctness of the instruction but said it was compelled to assume the jury followed the instruction and awarded only actual damages. As actual damages, the verdict was held to be excessive and a remittitur of $1,000 was required on pain of reversing the case as to damages only. If there is no appeal by either side on a legal point, the Court ordinarily does not rule thereon.

A comment on common knowledge was held to be a comment on the evidence in *G. M. & O. R. R. v. Weldy.*[22] In an action for personal injuries from an assault and battery by an employee of defendant railroad

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[18]192 Miss. 800, 6 So. (2d) 608 (1942).
[19]116 Miss. 431, 77 So. 191 (1918).
[20]172 Miss. 315, 159 So. 542 (1935).
[21]191 Miss. 628, 3 So. (2d) 826 (1941).
[22]8 So. (2d) 249 (Miss. 1942).

company, plaintiff's instruction stated, "defendant was charged with common knowledge that servants sometimes disobey orders." The instruction was held to be a comment on the evidence, suggestive and argumentative, hence reversible error. The Court said,

> "The principle of judicial knowledge is a rule of evidence and not a substantive law. Matters of common knowledge are evidence within themselves and are not proper subjects for instructions."[23]

Also, the danger in the practice of copying language from the reasoning part of the written opinions was again forcibly pointed out.

(6) Assignment of Errors

And in *Banking Commission of Wisconsin v. Jacobson,*[24] there was an appeal from the county to the Circuit Court and there appellant filed his assignments of error out of time but before the actual hearing and same were considered by the Court. The Circuit Court affirmed the County Court at appellant's cost and appellant appealed to the Supreme Court where the case was reversed. But the Court held appellee was not injured by the assignment of errors being filed out of time in the Circuit Court as it affirmed the County Court, thereby deciding the case in the appellee's favor.

(7) Substituting Judgment at Subsequent Term

In *M. & O. Ry. v. Flanagan,*[25] it was held that a case which was reversed and remanded in 1925 wherein appellee failed to pay cost, was still within the jurisdiction of the Supreme Court 17 years later under Supreme Court Rule 29. Appellant and appellee, after the costs had been paid by the former, jointly moved for a judgment reversing and dismissing the cause. The Court observed that there was prior authority for vacating or opening a judgment after the term if done by consent of all parties, and held a power extended to substituting and entering an agreed judgment between all parties, especially one ending the litigation.

F. Removal of Causes

The rather troublesome question of removal of causes to the federal court was brought to a sharp focus recently and finally decided by a divided Court. In *Montgomery & Atlanta Freight Lines, Inc. v. Morris,*[26] the suit was filed in Hancock County by an administratrix, a resident citizen of Georgia, against the defendant, a Georgia corporation, on a death claim that occurred in Louisiana. The defendant first plead to the jurisdiction on the grounds that its interstate commerce business would be unduly burdened by a trial in Mississippi, far removed from many wit-

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[23] *Id.* at 251.
[24] 192 Miss. 27, 4 So. (2d) 538 (1941).
[25] 8 So. (2d) 241 (Miss. 1942).
[26] 7 So. (2d) 826 (Miss. 1942).

nesses in Georgia and Louisiana. Testimony was heard thereon and the plea overruled. Plaintiff then amended her declaration, leave being first obtained, by adding as plaintiffs, the husband and children of deceased, who were all residents of Mississippi, thus giving the case a diversity of citizenship. The defendant then filed his petition and bond, and obtained an order for removal to the federal district court on the grounds of diversity of citizenship. The federal district court sent the case back on the grounds that the defendant waived his right to remove by filing a plea in the state court prior to his petition to remove.

Back in the state court, defendant then filed a plea to the jurisdiction and a demurrer, but withdrew same and filed a plea in abatement to dismiss the case as to the administratrix and all parties plaintiff except the husband and minor child of the deceased as they were the only parties in interest under the Louisiana law. This plea was sustained, and the defendant again filed his petition and bond for removal to the federal court on diversity of citizenship, and this petition was denied and the trial proceeded on the merits. On first consideration, the Court held that the second petition for a removal should have been sustained; that the federal statutory requirement that such petitions be filed on or before the time defendant is required to answer or plead does not apply if the grounds for removal had not then arisen, and also that delay of certain kinds could be explained; that when an event occurs that gives cause for removal, the petition to remove, promptly filed, should be granted. This holding was partly predicated on a statement of fact in the opinion that diversity of citizenship did not arise until the administratrix was eliminated as a party plaintiff after the case had been remanded. This was an error as to the facts because the husband and children were added prior to the first removal, and in law, the administratrix was not a party in any event because she had no right to bring the suit under Louisiana law.

The Court reconsidered the case on suggestion of error, *Montgomery & Atlanta Freight Lines, Inc. v. Morris*,[27] wherein the facts were corrected, but still reversed the case, with two justices dissenting. This latter holding is not to the effect that the state trial court should have granted the second motion to remove; but is to the effect that the federal district court should not have remanded the case back to the state court. When a case is so remanded back to the state court, it should proceed with the case, but the parties may appeal and have the correctness of the federal court's remand passed on by the State Supreme Court (which on a federal question is a federal court) and also by the United States Supreme Court, as the federal statute providing there shall be no appeal from an order of remand by the federal court does not preclude the question of jurisdiction being raised later in a higher court after the case has been disposed of by

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[27]8 So. (2d) 502 (Miss. 1942).

the state trial court. The Court said that the federal district court should not remand this case back again, but had the power to dismiss the cause for want of jurisdiction, which would be a final judgment appealable to the higher federal courts. The effect of the holding in this case is that a case is being sent back to the federal district court, from whence it was once remanded without any change in the facts since the remand.

G. Bill of Review

Cases of bill of review are rather rare, but two of them were recently before the Court. The first is *Felder v. McCormick,*[28] in which an alimony decree against H, which subjected his land thereto, was unpaid at the death of the former wife to whom the award was made. H and his second wife brought this suit, claiming that the claim for unpaid alimony did not survive the former wife, that the land had now become the homestead of H and the second wife, and prayed for "a correction of the decree, if necessary, in accordance with the alleged facts, and for an injunction restraining the execution of the former decree." The suit was dismissed, on the ground that it was a bill of review filed beyond the two-year statutory limit and without leave of the court. The Court concluded that the suit set forth a new cause and was not a bill of review. As the second wife was not a party to the original suit, she could assert her homestead right, if any, by a new suit in which the husband could join.

However, in *Majure v. Johnson,*[29] defendant filed an answer and cross-bill to complainant's bill in the original case between the parties. Thereafter, without leave of court, complainant filed two additional complaints on the same basic facts, terming them amended bills but without reference to the former bills. No process was had on these additional complaints, and no answers thereto were filed. A copy of the last filed complaint was sent to defendant's attorney in accordance with Section 394, Code of 1930, and said attorney replied by letter, four days before the following court term, that no process need be issued but this letter was not made a part of the record, and the decree rendered was not based thereon in so far as process was concerned. The defendant failed to appear; a decree *pro confesso* was taken and later in the term a final decree thereon. Later, defendant filed this suit, a Bill of Review, contending that the additional complaint, on which a decree was given, was merely an amendment of the original complaint, and that his answer on file precluded the decree *pro confesso,* and a decree thereon against him. The plaintiff contended that the additional complaint on which judgment was had was a new bill, complete within itself, and that effective process therefore was obtained on defendant as his attorney's conduct amounted to a waiver of the actual summons.

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[28]191 Miss. 851, 4 So. (2d) 363 (1941).
[29]192 Miss. 810, 7 So. (2d) 545 (1942).

The Court held that if the second amended bill is considered an amendment, then defendant's answer precluded a decree *pro confesso* thereon. If the second amended bill is a new complaint, the decree *pro confesso* does not state nor show sufficient facts to prove process on the defendant; it does not show on its face that it purports to be based on a waiver of process. The letter was not then before the Court. Compliance with Section 394, Code of 1930, will not authorize a decree by default on a newly filed bill which is in effect a new bill complete within itself. The bill was for error apparent on the record; therefore, all evidence of matters transpiring before the decree but not in the record was not admissible. The record itself shows error in that it does not show the defendant was brought in court in a lawful and binding matter as to the bill on which the decree was based. The bill of review should not have been dismissed and case was reversed.

H. Appeals

(1) Nature of the Right

In *Redmond v. City of McComb*,[30] the case was appealed from the County Court to the Circuit Court by notice of appeal and bond, but no notice was given to the reporter to transcribe the notes. The Circuit Court summarily dismissed the appeal "for failure of the defendant to give notice to the court reporter." It was determined that an appeal may be taken without a transcript of the evidence and that appellant is entitled to stand on the record as made and to have the same considered. The basis of the Court's holding is that an appeal is a statutory right and is not defeated by a failure to complete some phase of the record.

(2) Methods of Perfecting

That a plaintiff cannot rest on the presumption that the necessary steps in perfecting an appeal will be taken by the officers is illustrated by *Oswalt v. Austin*.[31] The trial court decree was rendered in December, 1940. No notice of appeal was given; no bond was given nor required of appellant administrator. The record was filed in the Supreme Court in November, 1941. Appellant had given due notice to the court reporter, paid him the fee, but the clerk had failed to file the record in the Supreme Court until November, 1941. On motion to dismiss the appeal, it was held that to perfect an appeal, a petition is not necessary but a petition, or a bond, where a bond is required, must be filed, or, the transcript of the record must be filed in the Supreme Court within the time allowed by Sections 20, 26 and 2323, Code of 1930. If no bond is given and none required, the time of filing the transcript of the record in the Supreme Court shall control. Compliance with one method is necessary to confer

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[30]192 Miss. 61, 4 So. (2d) 494 (1941).
[31]192 Miss. 653, 6 So. (2d) 924 (1942).

jurisdiction; the failure of the clerk to file the record will not confer jurisdiction. Appellant's remedy was a motion for a writ of certiorari in the Supreme Court in time to have had the record filed in the Supreme Court in the limited time. The appeal was dismissed.

(3) Interlocutory

Moore v. Stewart,[32] is a case where the Court found it could not "settle the controlling principles involved in the cause" on interlocutory appeal. A petition was filed for the probate of an exhibited writing as a holographic will, the legal sufficiency of which the contestants sought to test by demurrer. All parties accepted this procedure and the demurrer was overruled and an appeal allowed "to settle all controlling principles involved in the cause." Although the appeal was dismissed as improvidently allowed, the Court refused to affirm or reverse the case as there was probable extraneous testimony not adduced that would shed light on the question of the instrument's validity. The Court also pointed out that it was not a case where a demurrer was sustained to a document impossible of authentication, nor a case where contestants allowed a final decree to be taken on demurrer.

An injunction was issued without notice in *Lumber Mineral Co. v. Warren.*[33] Defendant filed a motion to dissolve and a special demurrer to the effect that the injunction was improvidently issued. The demurrer was sustained without an adjudication dismissing the bill, or a ruling on the right to the injunction on the merits. Complainant appealed and the decree was held interlocutory by the Court. Without passing on whether the decree "settled the controlling principles of the case" the appeal was dismissed as same had not been authorized by the Chancellor as required by Section 14, Code of 1930.

Lott v. Windham,[34] was decided on a point of law which settled a point of procedure. A special demurrer in the trial court set up grounds that the complaint was multifarious and repugnant. The demurrer was sustained and an appeal granted "to settle the principles of law involved in this case." The Court held that the demurrer raised and the decree settled merely a procedural matter and that the question decided would not settle the "controlling substantive principles involved in the case as contemplated by Section 14, Code of 1930." The case expressly limits Section 14 to substantive principles of law to the exclusion of procedural matters.

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[32]192 Miss. 158, 5 So. (2d) 237 (1942).
[33]192 Miss. 422, 6 So. (2d) 319 (1942).
[34]191 Miss. 849, 4 So. (2d) 342 (1941).

I. Supreme Court

(1) Written opinions

In response to a suggestion of error requesting a written opinion, the Court in *Heath v. State,*[35] declined to give a written opinion on the ground that no good purpose would be served thereby and for the further reason that the burden of case law had long since become almost unbearable to both bench and bar, and its extension should be curtailed. A reference to the numbers of the two cases found on pages 241, 242 of 8 So. (2d) will show that during the last 17 years approximately 10,000 separate matters have been disposed of by our Supreme Court. Shorter and fewer opinions seem to be the necessary and welcomed trend.

(2) Jury Questions

Garrison v. Dennis,[36] was an action for rent and for conversion of a crib. When the evidence shows the conversion without dispute but varies as to the value of the crib, but there being no decision by the jury as to the conflicting evidence on the value thereof, the Supreme Court will not fix a value thereon from the evidence but will remand the case for a decision by a jury as to said value.

(3) Briefs

Ramsey v. Milner,[37] illustrates one of the Supreme Court's rules of necessity. On appeal appellant urged two grounds for reversal of the case, the answers to which were not at once, or manifestly, apparent. Appellee filed no brief and made no argument. The Court reversed and remanded the case without prejudice and stated that it would not undertake the preparation of a brief for appellee. The Supreme Court doubtless does a great deal of brief work. This case merely holds they will not do it unless the counsel at least makes an effort in the case.

IV.

PROPERTY

*W. S. Henley**

A. Adverse Possession

In the case of *Broome v. Jackson,*[1] a wife whose husband abandoned and deserted her in 1920 and who had remained in actual and open possession of the land upon which they had formerly resided and claimed it

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[35] 192 Miss. 345, 5 So. (2d) 235 (1942).
[36] 7 So. (2d) 517 (Miss. 1942).
[37] 192 Miss. 120, 4 So. (2d) 889 (1941).
*Member Mississippi and Copiah County Bars; Hazelhurst, Mississippi.
[1] 7 So. (2d) 829 (Miss. 1942).

against everyone until 1934, when she was forced out of possession by her husband, sought to establish title by adverse possession and succeeded in upholding such title.

In the case of *Leggett v. Norman,*[2] two owners agreed to exchange lands and although the grantee did not execute his deed in return, where grantor and son moved on the land and continued to occupy the same, made improvements and repairs and had the property assessed and paid taxes thereon, such occupancy was hostile and adverse and would defeat a claim made to the property after ten years had expired.

B. Oil and Gas

Loyd's Estate v. Mullen Tractor & Equipment Co.[3] upholds the validity of a perpetual oil and gas lease as against the contention that it violated public policy and the statute against perpetuities.[4] This lease appeared to be on the form in customary use and was held not to be ambiguous or contradictory. The lessee had not violated an implied covenant to develop the property for oil and gas within reasonable time under the facts of this case.[5]

The case of *Whelan v. Johnston*[6] involves the right to oil and gas on the right of way of the Yazoo & Mississippi Valley Railroad Company. The statutes under which right of way was condemned provided that the railroad company would acquire a "fee simple" title, and the act incorporating the railroad company provided for perpetual existence. Under the circumstances, the minerals passed to the railroad company where the right of way was acquired through condemnation proceedings.

Pace v. State[7] in part overrules *Gulf Refining Company v. Terry.*[8] An agricultural lessee under a 99-year lease of 16th section lands is not entitled to enjoin the exploration or development under an oil and gas lease executed by the public authorities but is limited to an action at law for damages. The effect of this decision makes it unnecessary to obtain an agricultural lessee's consent to an oil and gas lease of 16th section lands in order to assure the lessee of the rights of ingress and egress.

In the case of *Sample v. Romine,*[9] the deceased and a defendant, who were men of financial means, furnished money with which plaintiff, who had had considerable experience in oil and gas business, purchased oil leases with the understanding that after repayment of money furnished

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[2]192 Miss. 494, 6 So. (2d) 578 (1942).
[3]192 Miss. 62, 4 So. (2d) 282 (1941).
[4]Miss. Code Ann. (1930) § 2117.
[5]*See* Note, *Property Rights in Oil and Gas in Mississippi* (1941) 13 Mississippi Law Journal 427.
[6]192 Miss. 672, 6 So. (2d) 300 (1942).
[7]191 Miss. 780, 4 So. (2d) 270 (1941).
[8]163 Miss. 869, 142 So. 457 (1932).
[9]8 So. (2d) 257 (Miss. 1942).

by deceased and the defendant the three would share one-third each in the enterprise, leases being taken in names of the deceased and the defendant. The undertaking was held to constitute a "joint adventure" which the plaintiff was entitled to enforce against the defendant and the deceased's widow, even though title to the property was taken in the name of two of the co-adventurers in this case. The leases were taken in 1929 and there was no development of the leased premises until 1939 and a well was produced in July, 1940. The plaintiff's suit to establish his interest was not instituted until January, 1941, and it was held that the same was not barred by "laches". This suit involved very valuable producing property in the Tinsley oil field in Yazoo County, and it is of unusual interest in that the complainant established his claim to rights granted on verbal arrangements after a long period of delay.

In *Merrill Engineering Co. v. Capital National Bank,*[10] the foreclosure of a deed of trust passed title to the mortgagor's royalty interest in outstanding oil and gas leases along with the surface, without regard to whether such royalty interests were mentioned in trustee's deeds since there was no specific reservation thereof from the fee sold.

C. Injury to Real Property

E. L. Bruce Co. v. Edwards[11] involves the question of the right to recover the statutory penalty for timber that has been cut where the property is described in the chain of title both of the plaintiff and the defendant for a period of from thirty to forty years but without proof of a common source of title. As neither record title appeared to be superior, the title depended upon the question of adverse possession as to which the evidence was in sharp conflict. Under such circumstances, the recovery was limited to actual damages.

In the case of *Louisville & Nashville R. R. v. Capdepon,*[12] the defendant was entitled to a directed verdict at the close of the plaintiff's testimony on the question of damages from surface drainage of water. However, this error was cured by the defendant's introducing evidence which was sufficient to support a verdict. The railroad company was required not only to construct its road bed so as not to obstruct the natural flow of surface water from the plaintiff's lot, but to maintain its road bed in such condition as to avoid damages to plaintiff's property.

In *Miller v. Ervin,*[13] the lower court granted a directed verdict against the receivers of the Mobile & Ohio Railroad Company for digging a ditch on the right of way and subjecting the plaintiff's land to overflow. The action of the lower court was affirmed as the evidence did not show there

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[10]192 Miss. 378, 5 So. (2d) 666 (1942).
[11]192 Miss. 1, 3 So. (2d) 846 (1941).
[12]192 Miss. 28, 4 So. (2d) 544 (1941).
[13]192 Miss. 712, 6 So. (2d) 910 (1942).

was any other equally safe, convenient and inexpensive method of protecting the railroad road bed. A question of practice is also involved in that the jury, while trying the case in Clay County, was permitted to inspect the property which was located in Lowndes County and to take some testimony at the location of the property. It was contended that the statute[14] authorizing the court to permit a jury to view the scene did not authorize such procedure outside of the county where the suit was being tried. A decision on this question was pretermitted, but the court declined to reverse this case on that ground.

In *Hooker v. Federal Land Bank of New Orleans,*[15] the evidence was insufficient to sustain a suit by the plaintiff for injuries allegedly caused by drinking water contaminated and poisoned through acts of the defendants. The action of the lower court in granting a directed verdict was sustained.[16]

In the case of *Board of Levee Commissioners for Yazoo-Mississippi Delta v. Withers,*[17] where the levee commissioners had constructed and maintained a sub-levee on their own land, the owner of the land on which a pond had been made by the construction of the sub-levee had no right to demand permanent maintenance of the sub-levee notwithstanding the fact that said sub-levee had been continuously maintained for thirty years, and such owner could not recover for consequential damages to adjacent lands in addition to actual value of pond site due to the abandonment of the sub-levee and the release of the water.

D. Deeds

In *Sellers v. Union Producing Co.,*[18] the description of a parcel of land, the length and width of which were given in the deed involved, gave directions to begin at an elm tree which is 16 feet west of the intersection of certain roads and "thence run 125 yards in a westerly direction through the lands of the grantors" situated in a certain section, township and range into one of said roads. The court pointed out that the elm tree might be located either at the northeast corner of a parallelogram or at the southeast corner thereof and that, therefore, there was no definite point of beginning and the description was indefinite and the conveyance void for want of a definite starting point.

In *Gunter v. Viverett,*[19] where both plaintiff and defendant showed record but imperfect title to realty and defendants were in possession, the

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[14]Miss. Code Ann. (1930) § 2066.
[15]192 Miss. 352, 5 So. (2d) 688 (1942).
[16]*See* Note, *The Mississippi Law of Nuisances* (1941) 13 Mississippi Law Journal 224, 231.
[17]192 Miss. 433, 6 So. (2d) 115 (1942).
[18]192 Miss. 780, 7 So. (2d) 821 (1942).
[19]8 So. (2d) 247 (Miss. 1942).

court held that it was error for the lower court to grant an instruction that deed to plaintiff's ancestor gave such grantee legal title to the land and to ancestor and his heirs the right to possession thereof.

In *Gaston v. Mitchell,*[20] a provision in a deed, "the above conveyance to take effect and be in force at the time of my death", rendered the deed testamentary in character in conformity with a long list of Mississippi cases and void for failure to comply with the necessary requirements relative to the execution of a will.[21]

In the case of *Mims v. Williams,*[22] the court also construed a deed to determine whether it was testamentary in character. After conveying the property to a certain grantee, the following clause was added: "Grantee to have possession of said property during his natural life and at his death title to same shall vest in the said Ben Williams." Ben Williams was the grantee and the clause was construed as meaning that the grantor was to have possession of the property during his natural life and was held not to convey an interest in the property *in praesenti,* and, therefore, to be testamentary in character.

E. Mortgages

Hancock et al v. Pyle et al,[23] is one of the most important cases recently decided by the Mississippi Supreme Court. A deed of trust and notice of the foreclosure thereof erroneously described a 10½ acre exception to property otherwise correctly described. Subsequent to the foreclosure, suit was filed to set aside the trustee's deed and to recover rent, etc. The court held that one of the essentials of a valid trustee's sale was "such a description of the property to be sold, as, if read by persons familiar with the neighborhood, will advise them of what is to be sold, and upon what terms it can be bought and induce them to attend the sale as prospective bidders, should they feel an inclination to invest in the property to be sold."[24] Thus, a distinction was drawn between the effect of an indefinite exception contained in a deed agreed upon by the parties and an erroneous exception in a foreclosure description. In the deed the exception would be void. In a foreclosure proceedings, an erroneous exception apparently renders the entire foreclosure proceedings void and would require a reformation prior to foreclosure. Justices McGehee, Roberds and Smith dissented in part.

In the case of *Smith v. Smith,*[25] where a husband intended to give a deed of trust upon land that was not in the homestead, but through error

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[20]192 Miss. 452, 4 So. (2d) 892 (1941).
[21]*See* Note, *Deeds Testamentary in Nature—Mississippi Law* (1938) 10 Mississippi Law Journal 183.
[22]192 Miss. 866, 7 So. (2d) 822 (1942).
[23]191 Miss. 546, 3 So. (2d) 851 (1941).
[24]*Id.* at 563, 3 So. (2d) at 853.
[25]8 So. (2d) 461 (Miss. 1942).

in the description part of the land was omitted and afterwards the husband and wife moved upon the property, the mortgagee was permitted to have the deed of trust reformed so as to correspond to the intention of the parties, even though the wife did not join in the execution of the deed of trust. The prior covenant to mortgage the property was superior to the homestead rights subsequently acquired.

In *Hubbard v. Massey*,[26] the court construed the two-year statute of limitations applying to judicial sales,[27] and upheld a credit on a mortgagee's indebtedness and the payment of taxes and expenses of the sale as a consideration within the terms of the statute. It was held that the statute bars the rights of a mortgagor's widow who was made party to the foreclosure proceedings as administratrix, but not as an heir, and the rights of an adopted daughter, who was not made a party to the foreclosure proceedings but participated to the extent of advising the administratrix with reference thereto.

F. Landlord and Tenant

Counsel for the appellee in the case of *Hiller v. Wiley*,[28] had the very fortunate experience of having a suggestion of error sustained. In a former opinion[29] a landlord was held not responsible for the reasonable upkeep of steps to a dwelling. The suggestion of error was sustained on the ground that the property occupied by appellee as a tenant was a double house and part thereof was leased to another tenant and that, therefore, the landlord was under obligation to use reasonable care in maintaining the common approach to the property in a reasonably safe condition.

In *Soderstrom v. Robinson*,[30] a judgment for a lessee for an allegedly wrongful eviction was reversed and dismissed. The record disclosed that the lessee was in default, but it was contended that the landlord had waived the delinquency in the rent. The court held that such waiver would not be valid unless supported by a consideration; therefore, there was no valid contract for the waiver.

In *Nelson v. Nelson*,[31] a husband sought to enjoin his wife from interfering with the collection of rents on houses which the husband had built on the wife's land, relying upon a gratuitious oral license granted by the wife authorizing the construction of the houses. The lower court sustained demurrer to the bill, and the decision was affirmed on appeal.

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[26]192 Miss. 95, 4 So. (2d) 230 (1941).
[27]Miss. Code Ann. (1930) § 2315.
[28]192 Miss. 488, 6 So. (2d) 317 (1942).
[29]5 So. (2d) 489 (Miss. 1942).
[30]8 So. (2d) 501 (Miss. 1942).
[31]8 So. (2d) 507 (Miss. 1942).

G. Trusts

Remmer v. Austin[32] announces the rule that as to implied and constructive trusts, the statute of limitations applying to trusts[33] begins to run from the time the act or acts, by which the actor becomes chargeable, were committed. The rule with respect to express trusts requires a repudiation of the trust before the statute begins to run.

H. Wills and Decedents' Estates

In the case of *Bell v. Mississippi Orphans' Home,*[34] a will executed within ninety days of the testatrix's death was held to be valid under the 1940 amendment to the Mississippi Constitution[35] relating to charitable, religious and educational devises and bequests. The prohibition against the execution of a will within ninety days of the testator's death applies only where a spouse or child or descendants of children survive.[36]

O'Bannon v. Henrick[37] involves a very close question of fact as to whether the evidence was sufficient to submit to a jury the question of undue influence upon the testator. In this case, a bachelor who habitually used intoxicants excessively devised all of his property to his financee, instead of his brothers and sisters. The Supreme Court was equally divided as to whether the evidence was sufficient to submit to the jury on this issue, which division resulted in an affirmance of the chancellor's decision declining to submit the issue to a jury.[38]

In *Morris v. Morris,*[39] the aged testator, who had lived in his son's home without charge for six years before testator's death, devised all of his property, consisting of $1,500.00 to the son by a will made no mention of other adult children who had their own homes. It was held that the circumstantial evidence was insufficient to establish "undue influence" by the son in procuring execution of the will.

In *Campbell v. Herod,*[40] where real estate which was held by a husband and wife as tenants in common was sold for taxes before the wife died and the husband accepted a devise of the life estate in his wife's interest in the realty, a conveyance from the purchaser at a tax sale to the

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[32]191 Miss. 664, 4 So. (2d) 224 (1941).
[33]Miss. Code Ann. (1930) § 2312.
[34]192 Miss. 205, 5 So. (2d) 214 (1941).
[35]Miss. Const. (1890) § 270 as amended by Miss. Laws 1940, c. 318.
[36]*See* Wells, *The Mortmain Amendments to the Mississippi Constitution* (1940) 12 Mississippi Law Journal 526.
[37]191 Miss. 815, 4 So. (2d) 208 (1941).
[38]*See* Note, *The Burden of Proof as to Testamentary Capacity and Undue Influence in Wills* (1934) 6 Mississippi Law Journal 403; Smith, *"Where There Is A Will, There Is A . . ." Burden of Proof; or Was Cornelius Sheehan Unduly Influenced* (1941) 14 Mississippi Law Journal 103.
[39]192 Miss. 518, 6 So. (2d) 311 (1942).
[40]7 So. (2d) 880 (Miss. 1942).

husband effected a "redemption" for the benefit of the remainderman named in the wife's will as well as the husband.

Bohn V. Bohn[41] construes sections 1410 to 1412[42] and holds that a widow is entitled to rents from the homestead and may occupy the same without accounting to the other heirs for rents.

The case of *Southern Cotton Oil Co. v. Gober*[43] was a contest between the surviving widow and the unsecured creditors of an insolvent decedent's estate. On satisfactory proof that the household goods which had been destroyed by fire before the decedent's death were actually the separate property of the widow, the proceeds of such policy were awarded to the widow. The widow, however, was unsuccessful in her efforts to have a note which was signed jointly declared to be the individual obligation of the decedent.

I. Personal Property

In *Stewart v. First National Bank & Trust Co. of Vicksburg,*[44] an executor sued to recover possession of a diamond ring and an automobile which the defendant claimed as a gift from the testator. Testimony for the executor showed title to the property in the testator. The defendant offered no testamony to establish a gift but relied upon the presumption of the gift based upon the mere fact of possession which the court did not consider sufficient for such purpose.

Ellzey v. Frederic[45] again construes the "Mississippi Sign Statute."[46] The operator of a gasoline filling station who sold soft drinks, beers, and cigarettes, and in connection therewith operated a bar and dance hall, was "doing business" within the terms of this statute, and a purchaser at a judgment sale acquired a superior title to a vendor under a conditional sales contract to refrigerators used in the operation of said business.[47]

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[41]5 So. (2d) 429 (Miss. 1942).
[42]Miss. Code Ann. (1930) § § 1410-1412.
[43]192 Miss. 729, 6 So. (2d) 919 (1942).
[44]192 Miss. 355, 5 So. (2d) 683 (1942).
[45]191 Miss. 633, 3 So. (2d) 849 (1941).
[46]Miss. Code Ann. (1930) § 3352.
[47]*See* Schmitt, *The Sign Statute in Mississippi* (1928) 1 Mississippi Law Journal 203.

V.

PUBLIC LAW AND TAXATION

*Fred J. Lotterhos**

A. State Highway Commission

In *Wilkinson County v. State Highway Commission*[1] the Supreme Court passed on the power of the Highway Commission to abandon a part of a road relocating a state highway. Some years ago the Commission had taken jurisdiction of a certain road in Wilkinson County which then became a part of State Highway No. 61. It was claimed by the county that at the time there was an agreement between it and the Commission that thereafter the road would be maintained by the Commission. In 1939 the Commission notified the county that it had relocated that part of Highway No. 61 and that eleven miles of the old road had been abandoned and were being surrendered to the county. The new paved highway was from eight to twelve miles from the original road thus abandoned.

The county took the position that the Commission had no authority to abandon this road, and hence filed a bill seeking a mandatory injunction to compel the commission to continue to maintain the eleven miles of old road.

The Court denied the relief on the ground that the Commission had authority to relocate the line of a state highway between points designated by the legislature and thereby abandon the original line.[2] It was held that in so relocating the highway a change of as much as twelve miles was not beyond the power, and in the opinion it was said:

> "So long as done for any good reason in the interest of through traffic, the authority in that respect is wholly at the discretion of the State Highway Commission."[3]

This case also involved the power of the Commission to make an agreement binding it to maintain such a road after subsequent relocation, since the bill alleged the existence of such an understanding. However, the Court held that there is no provision in applicable statutes authorizing "the State Highway Department to make any such contract with a county as to bind the Commission to an obligation to maintain any road after abandonment in the process of relocation by the State Highway Department."[4]

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*Member Mississippi and Hinds County Bars; Jackson, Mississippi.

[1]Wilkinson County v. State Highway Commission, 191 Miss. 150, 4 So. (2d) 298 (1941).

[2]Trahan v. State Highway Commission, 169 Miss. 732, 151 So. 178 (1933).

[3]Wilkinson County v. State Highway Commission, 191 Miss. 750, 755, 4 So. (2d) 298, 299 (1941), cited *supra* note 1.

[4]*Id.* at 756, 4 So. (2d) at 299.

In *State Highway Commission v. Mason*[5] it was held that when the Highway Commission parked machinery being used in highway construction on private property near the road without the consent of the owner it was liable in damages to the owner under Section 17 of the Constitution.[6]

Subsequent to this decision the Commission filed a motion attacking the judgment entered in the Supreme Court because it included (1) interest from the date of the original judgment, (2) five percent damages on affirmance, and (3) costs. The Court overruled the motion.[7]

The appellant relied on the well-established general rule that the State and its agencies are not liable for costs and interest unless so provided by statute. The Court did not question the rule, but considered whether it applied in this particular case. The decision was based directly on Section 17 of the Constitution, it being the view of the Court that unless interest and costs were allowed there would not be full compensation for the damage. It was pointed out that there is no reason for a different rule in the case of a suit for damages by the owner than in the case of an eminent domain suit by the State. As to the five percent damages, the Court had some doubts, but reached the same conclusion on the theory that the State is subject to the same rules as private parties in exercising its authority to take private property. Chief Justice Smith dissented, and Justice Roberds dissented as to the five percent damages.

B. Unemployment Compensation Commission

Mississippi Unemployment Compensation Commission v. Avent[8] involved a question of application of the Unemployment Compensation Law.[9] The act is applicable to any employing unit which itself, or together with another employing unit owned or controlled by the same interests, has eight or more employees. Appellee had owned a drug store with six employees and a dairy with four. He then transferred the dairy to his wife. A controversy arose as to whether he was under the act, since he now had only six employees; hearings resulted as provided by the statute, and ultimately there was a holding by a board of review that he must comply with the statute. The board of review found as a fact that appellee had retained "control" of the dairy after its transfer to his wife. The decision of the board of review was reversed by the Circuit Court, but the Supreme Court then reversed and rendered the case.

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[5]4 So. (2d) 345 (Miss. 1941).
[6]Miss. Const. (1890) §17.
[7]State Highway Commission v. Mason, 6 So. (2d) 468 (Miss. 1942).
[8]4 So. (2d) 296 (Miss. 1941).
[9]Miss Laws 1936, c. 176; Miss. Laws 1938, c. 147; Miss Laws 1940, c. 295.

The basis of the decision was that under the statute the finding of fact made by the board was conclusive "if supported by the evidence and in the absence of fraud."[10]

On suggestion of error the Court remained of the same opinion[11] and expressly stated that the act as applied to appellee under the circumstances of this case was not contrary to the State or United States Constitution.[12]

C. Public Officers

In *Causey v. Phillips*,[13] the right of the State Auditor to sue the secretary of the State Board of Barber Examiners on his bond for an alleged misapplication of funds was upheld. The suit was brought under the statutes authorizing the State Auditor to examine into the financial affairs of every state office and to sue for recovery of any amount shown to be due the State by any officer or employee.[14] The Court reviewed the statute creating the barber board and ruled that the members of the board are state officers and that the secretary is either a public officer or employee. There was a dissent by Justice Anderson.

D. Unfair Competition

Memphis Steam Laundry v. Lindsey[15] involved questions of unfair competition in business and the right to recover damages therefor. It was held that, although a person in business has the right to cut prices at will, yet he becomes liable in damages if he cuts prices for the malicious and wilful purpose of injuring and destroying a competitor. The action is not based on conspiracy but on the tortious act of malicious injury, and the intention of the party becomes an important element in the case. The opinion includes a discussion of many pertinent matters arising in cases of this kind.

E. Authority to Collect Taxes

City of Natchez v. Craig[16] was a suit by the State Tax Collector to recover for the State a contractor's tax alleged to be due under the Sales Tax Law.[17] It was initiated by attachment of funds due by the City of

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[10]Mississippi Unemployment Compensation Commission v. Avent, 4 So. (2d) 296, 297 (Miss. 1941), cited *supra* note 8.

[11]Mississippi Unemployment Compensation Commission v. Avent, 4 So. (2d) (Miss. 1941).

[12]Avent appealed to the United States Supreme Court, but the appeal was dismissed for want of a substantial federal question. Mississippi Unemployment Compensation v. Avent. 62 Sup. Ct. 947, 8 L. ed. 864 (1941).

[13]191 Miss. 891, 4 So. (2d) 215 (1941).

[14]Miss. Code Ann. (1930) §3753, as amended.

[15]5 So. (2d) 227 (Miss. 1941).

[16]191 Miss. 567, 3 So. (2d) 837 (1941).

[17]Miss. Laws 1934, c. 119, as amended.

Natchez to the contractors, who were non-residents, and the city contended that funds in its possession were not subject to garnishment because of immunity established under a line of cases relied on.

However, the Supreme Court did not find it necessary to pass on this question, for the reason that it had recently been held in another case[18] that enforcement of any of the provisions of the Sales Tax Law in any of the courts of this state is vested exclusively in the jurisdiction of the Chairman of the State Tax Commission in so far as the State Tax Collector, and other statutory officers, are concerned.

Another case involving the power of the State Tax Collector was *Craig v. Columbus & Greenville Ry.*[19] The State Tax Collector sued the railroad company for a franchise tax alleged to be due under the statute requiring corporations to pay $1 per $1,000 on the amount of capital.[20] One defense was that the tax collector was without authority to sue for this tax, but the Court found it unnecessary to consider it. Another was that the statute provides a method of assessment by the Chairman of the State Tax Commission, which is exclusive, so that no tax can be collected except that assessed in the statutory manner by the chairman. This defense was sustained by the Court. A companion case was to the same effect.[21]

Similarly, in *Craig v. Southern Natural Gas Co.*[22] the Court held that the Tax Collector could not collect a privilege tax imposed on pipe lines[23] at a rate of $50 per mile of pipe having a diameter of twenty inches or more, where there had been no assessment by the Chairman of the State Tax Commission, as provided in the statute. In this case, the Chairman had made no assessment whatever because he determined that he was prevented from doing so by a Federal injunction. The Court held that the assessment was an essential step in the collection of the tax and that it was exclusively in the power of the Chairman to make it.

Two answers to this defense were set up by the Tax Collector, but both were overruled. They were (1) that the pipe line company had filed an information return which showed the length and diameter of its pipe, and (2) that the Tax Commission had assessed it for ad valorem taxes by an assessment which showed the length and size of the pipe. It was the view of the Court that neither of these constituted the statutory assessment by the Chairman of the Tax Commission for privilege tax purposes. A companion case was *Craig v. Willmut Gas & Oil Co.*[24]

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[18]Dunn Construction Co. v. Craig, 191 Miss. 682, 2 So. (2d) 166 (1941).
[19]5 So. (2d) 681 (Miss. 1942).
[20]Miss. Laws 1934, c. 121.
[21]Craig v. Canton, Aberdeen & Nashville R. R., 5 So. (2d) 682 (Miss. 1942).
[22]8 So. (2d) 230 (Miss. 1942).
[23]Miss. Laws Ex. Sess. 1936, c. 20, §180.
[24]8 So. (2d) 233 (Miss. 1942).

The case of *Viator v. State Tax Commission*[25] upheld the right of the Chairman of the State Tax Commission to make an additional assessment under the Sales Tax Act as amended[26] even though it is not shown that the taxpayer has not kept adequate records. The statutory procedure had been followed and on request of the taxpayer there was a hearing before the Tax Commission after the Chairman had made the assessment. The Court held that when the order was reviewed in Circuit on certiorari and it appeared that the jurisdictional facts were set out, it was not necessary for the order to contain the facts on which the assessment was made.

The Court declined to pass on the constitutionality of the section of the statute depriving the taxpayer of the right to an injunction, because the invalidity of that section would not affect the balance of the act and the appellant's rights. The United States Supreme Court declined to review the case.[27]

F. Sales Taxes

Independent Linen Service Co. v. Stone[28] involved first the question whether a company engaged in the business of renting linens, towels, etc., to its customers, and laundering its property but not that of others, was required to pay a 2% sales tax under the statute imposing such tax on laundries.[29] The Court construed the tax statute favorably to the taxpayer and held that a tax on laundries did not apply to linen service companies.

But this case involved also a question of much broader interest. In several earlier cases the records have presented the problem whether a taxpayer, not liable for a privilege tax under the terms of a statute, would nevertheless be required to pay it or be prevented from recovering it after payment, under the so-called "trustee theory"[30] or under the rule recognized in some states against "unjust enrichment." This is the first case in which the Mississippi Supreme Court has expressed itself on these points.

In this case appellant had collected a tax of 2% from its customers, and had paid the tax to the State. It then sued for a refund because its business was not taxable under the statute. The Court disposed of the "trustee theory" raised in defense by pointing out that in the case of *Adams* v. *Saunders*[31] the defendant held the funds in trust because he had collected them as tax collector and by virtue of his office, whereas in the

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[25]5 So. (2d) 487 (Miss. (1942).
[26]Miss. Laws 1938, c. 113.
[27]Viator v. State Tax Commission, 62 Sup. Ct. 1109, 86 L. ed. 935, 86 L. ed. 1158 1941).
[28]6 So. (2d) 110 (Miss. 1942).
[29]Miss. Laws 1936, c. 158, as amended.
[30]Adams v. Saunders, 89 Miss. 784, 42 So. 602 (1907).
[31]*Ibid.*

present case the linen company "did not collect the tax by virtue of any office, or color of office, held by it."[32]

As to the "unjust enrichment" theory, the Court distinguished cases from other jurisdictions and held that this doctrine would not prevent recovery of the tax by the linen company, for the following reasons: (1) the company was under no duty to the State to collect the tax; (2) it might possibly be liable to its customers for a refund and hence had a better right to the money than the State, which had "no right to it whatever"; and (3) the Sales Tax Act denies the use of injunctive relief, but forces prompt payment of a tax, though it is doubtful, leaving the taxpayer to contest the collectibility of the tax by suit for refund, whereby the taxpayer so paying has "the right to sue for its recovery, without the sacrifice, on his part, of any of his rights because he yielded to the threatening provisions of the law inducing such payment."[33]

Justices Griffith and Anderson dissented because they were of the opinion that the "unjust enrichment" doctrine should prevent recovery of a refund.[34]

In *Cook v. Stone*[35] the Court passed on the question whether a construction contract between the State and a contractor was to be excepted in determining the gross income of the contractor as a basis for payment of a contractor's tax of 1%.[36] The Court denied a claim for refund by the contractor, and followed earlier decisions holding that similar taxes under the same statute were not taxes on sales, but taxes on local activities involved in the production of articles for sale. The Court went further and said that the delivery of a finished highway to the State under a construction contract was not a sale. The opinion was in answer to the contractor's contention that such a contract was to be excluded from the measure of the tax under the statute.[37]

G. Gasoline Tax

The case of *Smith County v. Hawkins*[38] involved the method of allocation of gasoline tax money by a county for use in the county under ap-

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[32]Independent Linen Service Co. v. Stone, 6 So. (2d) 110, 112 (Miss. 1942), cited *supra* note 28.

[33]*Id.* at 113.

[34]*Ibid.*

[35]5 So. (2d) 223 (Miss. 1941).

[36]Miss. Laws 1934, c. 119.

[37]Miss. Laws, 1934, c. 119, §2 (h) provides: "In computing the amount of tax levied under this act, there shall be excepted from the gross income of the business, or gross proceeds of sales, as the case may be, so much thereof as is derived from sales to the United States government or the state of Mississippi, its departments and institutions, or from business which the state of Mississippi is prohibited from taxing under the constitution of this state or the constitution of the United States."

[38]5 So. (2d) 684 (Miss. 1942).

plicable statutes. It was held that the statute[39] is mandatory in requiring the allotment for principal and interest of road bonds to be based on the aggregate amount of bonds and the assessed valuation of property, and therefore that the order of the board of supervisors must find and adjudicate these basic facts.

It was further held that the remaining funds, for maintenance purposes, are to be allocated by the board, and that the courts have no jurisdiction to substitute their judgment for that of the board in determining the proper distribution. It was said that the intent of the statute was that the money be applied to roads, bridges and culverts wherever they might be in the county, according to the needs, pursuant to the judgment of the entire board, and not arbitrarily according to district lines. However, it was held that, in the absence of fraud or manifest abuse of discretion, a distribution in percentage amounts to the several districts would not be declared invalid.

H. Inheritance Tax

In *Strange v. State Tax Commission*[40] the question was whether, in determining its valuation for tax purposes under the Mississippi Inheritance Tax Statute, certain stock should be included at its book value of $148,000, or at its sale price of $10,000. Two brothers had entered into a valid contract years before whereby the stock involved was at the death of either to be sold to the other for $10,000, at the option of the survivor. When one brother died, the other exercised his option. The Court held that the agreement was a contract and not a will; that the adequacy of the consideration was determinable as of the time when the contract was made; and that the sale price as fixed by the contract and as actually paid under the option fixed the value for tax purposes.

I. Privilege Taxes

Several recent decisions have passed on the constitutionality of a 1940 statute imposing a privilege tax, measured by a percentage of the business done, on the business of purchasing or acquiring notes or other evidences of indebtedness secured by liens on certain classes of personal property.[41] The first of these cases was *Stone v. General Contract Purchase Corp.*[42] It involved a claim for refund by the taxpayer, and the claim was divided into two parts.

The finance company maintained two offices, one in Jackson, Mississippi, and one in Memphis, Tennessee. At each office it acquired commercial paper of the kind described in the statute, secured by liens on personal property in Mississippi. The Memphis office sent representatives

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[39]Miss. Laws 1938, c. 144 §30 (b).
[40]7 So. (2d) 542 (Miss. 1942).
[41]Miss. Laws 1940, c. 110.
[42]7 So. (2d) 806 (Miss. 1942).

into Mississippi from time to time to collect notes, inspect property on which the company had liens, and perform similar acts.

The trial court denied the refund claim as to the Jackson office and the Supreme Court affirmed. On this phase of the case the Court held (1) that the tax was a privilege tax and not a property tax and (2) that it was unnecessary to determine whether certain exceptions and other provisions were unconstitutional, because if they were they would be ignored and the balance of the act would be enforceable.

As to the business of the Memphis office, the trial court allowed the refund of tax, but the Supreme court reversed. In holding the statute valid in imposing the tax on the Memphis business, the Court said (1) that the Legislature was not bound by court decisions defining the term "doing business" but had the right to make a new definition, (2) that the company was taxable for the benefits it enjoyed in having the State protect its security in Mississippi and in sending collection agents and other representatives into the state, and (3) that if the business was within the classification of interstate commerce there was no unconstitutional interference because the tax was imposed equally as in the case of intrastate business.

On the latter part of the decision there was a specially concurring opinion by Justices Alexander and Griffith. They held the view that the Memphis business was not taxable, but that the statute validly included that part of the business in the measure of the tax imposed for business done through the Jackson office.[43]

Another case decided at the same time as the one discussed above was *Stone v. General Electric Contracts Corp.*[44] The Court followed the same doctrine. The difference between the facts in this instance and in the other was that here the only business carried on by the corporation was through an office outside of Mississippi and it had not qualified in this state. The Court held that nevertheless it was doing business here under the statutory definite and that Mississippi had the power to impose a privilege tax.

Justices Alexander and Griffith dissented pursuant to their specially concurring opinion in the *General Contract Purchase Corp.* case.[45] They filed a convincing opinion to the effect that the business of appellee was interstate in character and not subject to taxation.

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[43]See Note, *When Is A Foreign Corporation "Doing Business" In Mississippi* (1941) 13 MISSISSIPPI LAW JOURNAL 548.

[44]7 So. (2d) 811 (Miss. 1942).

[45]Stone v. General Contract Purchase Corp., 7 So. (2d) 806 (Miss. 1942), cited *supra* note 42.

There were several other cases to the same effect as the two discussed above and following them without extended comment.[46]

But the Court in one case held this statute not applicable to a particular business. In *Stone* v. *Allis-Chalmers Manufacturing Co.*[47] the decision was that a company manufacturing farm and industrial machinery, and selling it, along with machinery purchased from others, to customers in Mississippi was not liable for the tax. This was true even though the company took notes for the purchase price secured by liens on the property sold, because it was not the intention of the statute to include such transactions. A companion case to the same effect was *Stone v. International Harvester Co.*[48]

J. General Property Tax

(1) Assessment and Levy

Gulf & Ship Island R. R. vs. Harrison County[49] involved the application of the statute[50] providing that when boards of supervisors levy taxes for general county purposes "the order shall state the rate, or levy, for each item making the total of the levy" for such purposes. The Harrison County board made a levy for general expenses without breaking it down into separate items. The railroad paid the tax under protest and then sued to recover it. The Court held that the railroad was entitled to recover a judgment because (1) the statutory provision was mandatory, (2) the county budget showing details was not a compliance, and (3) taxing statutes of doubtful meaning will be construed against the taxing power.

In *City of Jackson v. Dixie Greyhound Lines, Inc.*[51] the Court passed on the right of a municipality to tax busses passing through the city on fixed routes, but without a fixed situs there. The City of Jackson attempted to impose a tax on those busses which regularly operated through the city and made stops there for varying lengths of time. It was held by the Court that under present statutes there is no authority in municipalities to assess such property because there is no situs for taxation established.

In the case of *Evans v. Calhoun County*[52] the decision was on the question of the time when an appeal may be taken from an order of a

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[46]C. I. T. Corp. v. Stone, 7 So. (2d) 811 (Miss. 1942); Stone v. Universal Credit Co., 7 So. (2d) 820 (Miss. 1942); Stone v. Yellow Manufacturing Acceptance Corp., 7 So. 2d) 820 (Miss. 1942); and Stone v. Commercial Credit Corp., 8 So. (2d) 456 (Miss .1942).

[47]8 So. (2d) 228 (Miss. 1941)

[48]8 So. (2d) 229 (Miss. 1942)

[49]4 So. (2d) 717 (Miss. 1941).

[50]Miss. Code Ann. (1930) §3227, as amended by Miss. Laws Ex. Sess. 1938, c. 28.

[51]4 So. (2d) 721 (Miss. 1941).

[52]5 So. (2d) 224 (Miss. 1941).

board of supervisors overruling an objection to an assessment.[53] In deciding the case the Court stated the applicable rules clearly and concisely, as follows:

> "1. No appeal will lie prior to the action of the supervisors upon the equalization by the State Tax Commission after its examination of the recapitulations provided for in Sections 3175, 3176 and 3177, Code of 1930.
>
> "2. An appeal does lie, within the time required, following that action by the supervisors.
>
> "3. Or such appeal need not be taken following such action but may be taken following the final action of the supervisors upon receipt by them of the certificates from the Tax Commission showing its receipt of and action upon the tax roll, under Section 3183, Code of 1930.
>
> "4. And if the appeal has been prosecuted following the action of the supervisors upon the equalization by the Commission, pursuant to said Sections 3175, 3176 and 3177, but the Commission, after receipt of the roll, shall make further changes therein, as provided in said Section 3183, the aggrieved party may prosecute a further appeal following the meeting of the supervisors finally approving such changes."[54]

Rule number two above is a statement of the actual holding of the Court in this case.

In *Craig v. Ingalls Shipbuilding Corp.*[55] it was held that ships under construction for the Federal government in this state are not subject to ad valorem taxation. The facts were that appellee was building certain ships for the United States Maritime Commission under cost-plus contracts. These contracts provided (1) that title to all materials assembled at the plant as well as to the vessels should "immediately be vested in the Commission," and (2) that the contractor should pay all taxes "lawfully assessed against the vessel, materials, supplies or equipment to be used under this contract prior to delivery thereof to the Commission."

The Court said that if a statute is needed to exempt Federal property we have it,[56] and that the last part of the contracts referred to above would not make the property taxable, because it meant only that the contractor must free the property of tax liens against the material when it came into the plant, since immediately when it came into the plant it became the property of the government.

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[53]For discussion of this problem see Note, *Taxpayer's Remedies in Mississippi For Improper Assessment of His Property* (1942) 14 MISSISSIPPI LAW JOURNAL 426.

[54]5 So. (2d) 224, 226 (Miss. 1941), cited *supra* note 52.

[55]5 So. (2d) 676 (Miss. 1942).

[56]MISS. CODE ANN. (1930) § 3108.

In Byrd v. Byrd[57] a title acquired by state patent was attacked on the ground that the tax sale to the State was void because the board of supervisors was not legally in session when the assessment was made. It therefore became necessary to consider the meaning of the code sections providing for board meetings and adjournments.[58] The board had convened in regular session for revenue purposes on the first Monday in July, 1930; then on Wednesday, July 9th, the board ordered that it would continue to equalize assessments until completed; on Friday, July 11th, it ordered "that for good and sufficient reasons the board do now adjourn until Monday morning, July 14th, 1930, at 8 o'clock a. m."; on or after July 14th the board finally approved the assessment; and on Wednesday, July 16th, it ordered "that the board do now adjourn until the first Monday of August, 1930 at 8 o'clock."

In sustaining a suggestion of error, the Court adopted a practical view of the statutory meaning, and held that the order of July 11th provided a mere recess and not a final adjournment; wherefore, the board was legally in session when it approved the assessment. It was pointed out that the board may recess to any time within the statutory limit of time for a term, without being limited to matters specifically recited in the order, and that such limitation applies only to an adjourned meeting held on a date beyond the statutory term. In this opinion on suggestion of error the Court withdrew the original contrary opinion.[59]

The original opinion passed on another question, which did not arise in the decision of the case on suggestion of error. The holding referred to was that a statute undertaking to render immune from attack sales of land to the State for taxes after two years from the expiration of the redemption period[60] did not apply when the landowner, either in person or by tenant, remained in uninterrupted possession.[61]

Miller v. Fulliwiley[62] involved the sufficiency of description in a land assessment. The facts were that the several assessments of the parts of a certain section of land aggregated an entire section, but the roll showed the number, township, and range of the section only opposite the first fractional part listed. The Court held that the description was adequate as it was clear that the other fractional parts were in the same section.

In *State v. Tallahala Lumber Co.*[63] it was held that on appeal to the courts from an assessment, where the question was whether the lands were cultivatable or uncultivatable, it was for the jury to solve the controversy when there was conflicting evidence.

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[57]8 So. (2d) 510 (Miss. 1942).
[58]Miss. Code Ann. (1930) § 202, 203.
[59]Byrd v. Byrd, 7 So. (2d) 551 (Miss. 1942).
[60]Miss. Laws 1934, c. 196.
[61]See *infra* page 54 for discussion of cases on this proposition.
[62]7 So. (2d) 799 (Miss. 1942).
[63]8 So. (2d) 230 (Miss. 1942).

(2) Tax Titles

The case of *State v. Roell*[64] involved the constitutionality and effect of a statute[65] providing for confirmation of title of State patentees as against the State unless the court shall find as a fact (1) that the State had not acquired title at the tax sale, (2) that the purchase price had not been paid by the patentee, or (3) that actual fraud had been committed by the patentee in obtaining the patent. The constitutionality of the statute was contested on numerous grounds, but the Court overruled all of them, relying on familiar rules of decision. In sustaining the validity of the act the Court construed it in two particulars of general interest.

(1) It was stated that the term "purchase price" as used was not intended in the sense that the courts would be required to confirm title if the price paid was "so grossly inadequate as to amount to a donation of the land from the State in violation of the Constitution."[66] (2) It was also stated that the term "actual fraud" as used in the statute carries the same "sense in which that term has been long understood in the legal jurisprudence of this state."[67] As a result of the last comment, the Court reached the conclusion that certain other statutes remained effective because violation of them would necessarily constitute actual fraud.

The Roell case was followed in *State v. Lewis*[68] which also sustained the constitutionality of the same statute. It was further held that the statute applied to cases where the patent was issued subsequent to the effective date of the statute, as well as where it was issued prior thereto.

Grant v. Montgomery[69] involved the construction of a statute fixing limitation of two years after maturity of a tax title in the State within which the land owner might attack the validity of the sale.[70] The holding of the Court was that the land owner retains his right to question the validity of the sale after expiration of the two years (1) where he has remained in actual possession, either by himself or tenant, after the sale, or (2) where he has not remained in actual possession, but there has been no adverse occupancy either by the State or its patentee for the period of limitations perscribed.[71]

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[64]7 So. (2d) 867 (Miss. 1942).
[65]Miss. Laws 1940, c. 309.
[66]State v. Roell, 7 So. (2d) 867, 869 (Miss. 1942), cited *supra* note 64.
[67]Id. *at* 870.
[68]7 So. (2d) 871 (Miss. 1942).
[69]5 So. (2d) 491 (Miss. 1942).
[70]Miss. Laws 1934, c. 196.
[71]See Note, *The* 1934 *Tax Title Statute and the Case of Russell Investment Corporation v. Russell* (1941) 13 MISSISSIPPI LAW JOURNAL 535.

A similar case was *Smith v. Anderson*,[72] which also involved the effect of a special statute of limitations applicable to tax titles.[73] It was held that, where co-owners had been in possession through a co-tenant and other parties and after a void tax sale of the land the same co-tenant and other parties retained possession, as tenants of the purchaser at the tax sale, but without any occurrence giving knowledge to the co-owners that these parties were no longer in possession for their benefit, then the three years statute would not deprive them of the right to attack the validity of the sale. The Court mentioned the fact that the purchaser at the tax sale knew that the change in occupancy was being successfully concealed from the original co-owners.

(3) Homestead Exemption

In *Coahoma County v. Clarksdale*[74] it was held that the code section[75] which requires the county to pay to municipalities maintaining their own streets one half of all road taxes collected by the county on property in such municipalities, applied to money reimbursed to the county by the State in lieu of road taxes of which the county was deprived by the Homestead Exemption Act.[76] The Court made a practical analysis of the statutes involved and applied a common sence construction to the reimbursement act, [77] under which the money involved had come into the possession of the county.

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[72]8 So. (2d) 251 (Miss. 1942).
[73]Miss. Code Ann. (1930) § 2288, providing a limitation of three years from the maturity date of a tax sale.
[74]7 So. (2d) 882 (Miss. 1942).
[75]Miss. Code Ann. (1930) § 6417.
[76]Miss. Laws Ex. Sess. 1938, c. 18.
[77]Miss. Laws Ex. Sess. 1938, c. 20.

VI.

TORTS

*John E. Stone**

There were twenty-two cases dealing with the general theme of Torts decided during the last term of the Supreme Court. These cases will be reviewed under the following heads: (A) Automobiles; (B) Libel and Slander, Malicious Prosecution and False Imprisonment; (C) Master and Servant; (D) Negligence; (E) Railroads; and (F) Miscellaneous.

A. Automobiles

In *Dunn Construction Co. Inc. v. Nail,*[1] plaintiff brought suit against the defendant construction company for alleged negligence in that no warning signs were placed at the intersection of the highway recently constructed by defendant but not then formally accepted by the State Highway Department. Plaintiff's injury occurred at night and there was testimony by several witnesses that the next morning warning signs were up along the road as formerly placed with the exception of a barricade which had been knocked down. The plaintiff testified that the warning signs were not up two days before the wreck. The Court applied the law of master and servant stating that the construction company in this case owed no greater duty than that owed by a master to his servant. The construction company could not keep a watchman present at all times to see that the warning signs remained up, and the defendant had neither constructive nor actual notice that the signs were down. Under the proof the defendant was entitled to a directed verdict.

Gulf Mobile & Ohio R. R. v. Baggett[2] involved a situation where plaintiff's eighteen year old daughter drove plaintiff's car onto the grade crossing of defendant's tracks. The driver admitted that she saw defendant's locomotive on the tracks at a time when she was fifty feet from the crossing and that the engine was one hundred feet therefrom, but not seeing any smoke she thought that the engine was not moving. In holding that the defendant was entitled to a peremptory instruction the Court stated that a locomotive in plain view, especially when moving, gave its own warning and that the statutory signals did not have to be given.

In *Jones v. Carter,*[3] the defendant, while traveling along a country road, had driven his car almost across the intersection of this road with one of the U. S. Highways; in fact, he had driven to a point where the front wheels were in the graveled portion of the road when his car was struck on its right side by the car in which plaintiff was riding. Defendant had

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*Member Mississippi and Hinds County Bars; Jackson, Mississippi.

[1] 7 So. (2d) 884 (1942).

[2] 8 So. (2d) 246 (1942).

[3] 7 So. (2d) 519 (1942).

entered the intersection when the car in which plaintiff was riding appeared four hundred sixty-eight feet away, and the speed of this car was not decreased until it was within forty-three feet of defendant's car.

The statutes[4] require the driver of a vehicle to stop at the entrance of a through highway and yield the right-of-way to other vehicles which have entered the intersection from said highway or which are approaching so closely from said through highway as to constitute an immediate hazard. These statutes have no application to a case where the driver of a vehicle comes to the intersection of a through highway and has entered into the intersection before it has been entered by a vehicle traveling said through highway, or has entered thereon before a vehicle on the through highway has approached so closely as to constitute an immediate hazard.

On cross examination, over objection, defendant was asked concerning his financial condition. This type of evidence is only admissible in cases where punitive damages are allowable, and this is not such a case; in fact, it was an extremely close question as to whether or not defendant was entitled to a peremptory instruction.

In *Sikes v. Thomas,*[5] the defendant, Mrs. Buchanan, of Meridian, with her friend, Mrs. Foster, and nine young ladies were in Laurel for the foot ball game between these two cities. The young ladies were seated about the car, plaintiff being seated on the left front fender with her feet resting on the front bumper. The entire crowd was highly excited and was the object of many jeers and outcries as it drove along the street. As this car traveled east along a paved street with a slight incline to the west, the truck of the defendant Thomas, driven by defendant Houston, came from the east traveling west and reached a car parked flush against the north curb. There the truck stopped, and Mrs. Buchanan drove into it, severely injuring plaintiff. Practically all witnesses, especially the disinterested witnesses, stated that the truck was stopped on its side of the road and that at least part of the Buchanan car was north of the center of the road. The cause of the accident was plaintiff's position on the car and the fact that the Buchanan car was north of the center line of the street. Judgment for defendants Thomas and Houston was affirmed, but was reversed as to Mrs. Buchanan.

Plaintiff in *Teche Lines, Inc. v. Pittman*[6] had arisen from her seat in defendant's bus upon the driver's signal with the idea of shortly alighting from the bus, when the driver suddenly applied the emergency brake to avoid striking a large hog which had started across the road. The application of the brake threw plaintiff to the floor of the bus injuring her, for which injuries she brings this suit. In reversing a judgment for the plaintiff the Court said:

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[4]Miss. Laws (1938) c. 200, § § 70 (a), 73.
[5]7 So. (2d) 527 (1942).
[6]191 Miss. 735, 4 So. (2d) 293 (1942).

> "A carrier is not liable for injuries to a passenger resulting from the application of the emergency brakes in order to avoid or prevent an imminent danger not otherwise avoidable, and reasonably believed to be attested with more serious consequences than sudden application of the brakes."[7]

The Court held that this rule was not applicable where the danger could have been seen in time to avoid it without application of the brakes. The bus driver's duty is to all of his passengers.

B. Libel and Slander, Malicious Prosecution and False Imprisonment

C.I.T. Corp. v. Carrero[8] was a case in which plaintiffs were engaged in the appliance business and defendant bought installment contracts on appliances which had been sold by plaintiffs. Whenever a purchaser failed to make payment, defendant would seize the property and store it with plaintiffs. Defendant's agent would call frequently at plaintiffs' place of business to check on the repossessed merchandise on plaintiffs' floor. On the occasion giving rise to this suit, one of defendant's agents called at plaintiffs' place of business and not finding any of defendant's goods on the floor tried to get plaintiffs to give an explanation. Failing in this, he notified his Memphis office, which sent another agent to his assistance. A conference was arranged in plaintiffs' office between plaintiffs and defendant and was held in a small office having beaverboard siding which did not extend to the ceiling. Unknown to defendant's agents a recording device was installed in the office and also two of defendant's employees were outside of the office in hearing distance during the time of the conference.

According to plaintiffs' witnesses during the conversation one of defendant's agents said: "You all know you are holding stolen merchandise," whereupon plaintiff asked, "Do you mean to tell me I was an honest man before I went into the appliance business and now I am a crook?" According to one of plaintiffs' witnesses defendant replied, "That is right." Another witness said the reply was, "If you want to take it that way it is all right with me."[9] The reason given on the trial by plaintiffs for not returning the merchandise was that the defendant was indebted to them.

The Court stated that these statements were made on a privileged occasion. The first statement did not exceed the privilege and the second was invited.

> "One cannot invite another to make a statement concerning him and when his request is complied with claim that he was slandered thereby, unless it appears that the privilege extended by

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[7]Id. at 739, 4 So. (2d) at 294.
[8]6 So. (2d) 588 (1942).
[9]6 So. (2d) at 590.

> the invitation was abused and made the occasion of maliciously publishing matter defamatory of the one extending the invitation."[10]

In the second count the slander was allegedly made to a former employee of plaintiffs while defendant was trying to locate the missing property. This statement was, "That is what we get for financing a couple of thievès." The defendant's testimony was, "That is what we get by dealing with a couple of crooks."[11] In order for plaintiffs to recover, the language must be identical with that charged or synonymous therewith; and thieves and crooks are not synonymous. A thief may be a crook, but a crook may not be a thief. The defendant was entitled to a directed verdict on the first count, and the plaintiff was not entitled to the directed verdict which he received on the second, but this was a question for the jury.

In *Brown v. Kisner*,[12] defendant Jacobs was a plantation rider on defendant Brown's wife's plantation. There were certain negroes on this plantation that one Greenlee desired to have moved onto his place; but when he sent for them Jacobs objected, and it was agreed that the negroes would not be moved until twenty-five dollars had been paid on the account of each. Notwithstanding this agreement Greenlee's brother and plaintiff moved two of the families at night and were on their way the next morning to move the third when they met Jacobs and informed him of what they were doing. Jacobs consulted a Justice of the Peace and had Greenlee's brother and plaintiff lodged in jail on a trespassing charge. Greenlee's brother and plaintiff were released when Greenlee gave a check for $125 on payment of the negroes' account. Later payment on the check was stopped. It was not shown that Jacobs had authority to cause plaintiff's arrest nor was it shown that he was acting under Brown's direction in the matter or that the prosecution was continued after Brown had full knowledge thereof. Brown was entitled to a peremptory instruction.

After his release from jail, plaintiff through his attorney learned that no actual charge had been made against him; therefore he had one made and Jacobs subpoenaed as a witness so as to secure an acquittal.

Jacobs was not entitled to a peremptory instruction for the following reasons: (1) a person's belief that certain facts constitute a crime unless they really do constitute such does not justify the institution of criminal proceedings, and there was no crime in this case; (2) advice of counsel does not apply to advice of a Justice of the Peace, clerk of court or layman, and Jacobs relied on advice of a Justice of the Peace.

The Court stated that in cases of this kind malice means that prosecution was instituted for a purpose or reason other than that of bringing

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[10] 6 So. (2d) at 590.
[11] 6 So. (2d) at 589.
[12] 6 So. (2d) 611 (1942).

the offender to justice, and as to Jacobs it was a question for the jury whether this was the case here. On the new trial in mitigation of damages the jury could take into consideration Jacob's belief that a crime had been committed. In the case of *Dewitt v. Thompson*[13] plaintiff brought suit against the sheriff, his bonding company, a deputy sheriff, and the Chancellor. A demurrer to the declaration was sustained, and the judgment was affirmed. The declaration charged that the plaintiff's wife had formerly been divorced from one Smith and that the children of this marriage had been temporarily awarded to her but that the order provided that the court retain jurisdiction to fix the permanent custody at a later date and during vacation. It was further charged that while plaintiff and his wife were eating their noon meal one day, the defendant deputy sheriff came to their home, informed them that the Chancellor wanted to see them; and when they arrived at the court room, the Chancellor "bawled them out," set aside the former order regarding the custody of the children, ordering that plaintiffs be placed in jail until they should post a bond of $500, that they remain within the jurisdiction and not remove the children from the jurisdiction of the court. After remaining in jail some time, plaintiff alleges that he was taken to the edge of the city by defendant deputy sheriff, informed that the Chancellor said for him not to come back until he had obtained employment, whereupon plaintiff was released.

There was no charge of corruption on the part of the defendants, nor that the Chancellor was without jurisdiction of the subject matter; but on the contrary it was a matter over which the Chancellor would have jurisdiction on a proper proceeding. This was a case of illegal action which would have been legal under proper proceedings. The Court would not go as far as some and say there was only responsibility on the part of judicial officers when their acts were done corruptly, but in this case there was no charge of corruption.

There was no liability on the sheriff or his deputy because they were not carrying out process of ministerial officers but of the Court itself as required of them.[14] They had the right to assume that the Chancellor was acting within his authority.

C. Master and Servant

In *Country Club of Jackson v. Turner*,[15] plaintiff sued for an assault and battery committed upon him by another servant while he was a servant of defendant. A third servant had called upon the assailant for assistance in having plaintiff to desist from disturbing this third servant while performing his work; and when insulting language was used toward assailant, he slapped plaintiff. The theory of the case as set forth in

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[13]7 So. (2d) 529 (1942).
[14]Miss. Code Ann. (1930) § 3315.
[15]4 So. (2d) 718 (1941).

the declaration was that the assailant was known to be a dangerous and vicious person and that defendant was liable as a result of keeping him in its employ.[16] In order to sustain his position plaintiff offered in evidence two other instances where assailant had chased other boys from defendant's property. The evidence for defendant showed that one boy was run off for selling whiskey and the other at the direction of defendant's superintendent for drawing a golf club on another servant in a threatening manner.

In holding that plaintiff had failed to make a case the Court said:

> "There must exist such a deviation from normal temper as to constitute as an unusual hazard any exposure to the probability of its manifestation."[17]

In *Byrd v. Anderson Tully Co.*,[18] one of the defendants whose servants caused the injury sued on was an independent contractor. The offer of plaintiff to prove statements of both defendants made on the morning after the accident tending to establish agency between defendant Humpries and defendant Anderson Tully was properly denied. Statements of one assuming to be an agent made out of the presence of the supposed principal and not as a witness in court, nor as a part of the *res gestae* are not competent to establish agency; nor is the denial of the alleged agent that he made such statements a proper matter for contradiction by other witnesses.

In *Craig v. Craig*,[19] plaintiff, employed by defendant as a carpenter, nailed some window frames temporarily in the building being constructed. Shortly thereafter defendant's superintendent inspected the frames, ascertained they were in line; but as plaintiff and the other carpenters were then working on the ceiling, he did not call them to renail the frames. Later, he directed plaintiff to nail some siding underneath the window and in so doing plaintiff mounted a step ladder, seized the window frame to steady himself, but as he did so the frame fell upon him, seriously injuring him.

In affirming the peremptory instruction given defendant in the lower court, the Court held that the master's duty to exercise reasonable care to furnish his servant with a reasonably safe place to work[20] did not apply in the construction and repair of buildings when the risks are those which

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[16]*See* Jones v. Alden Mills, 150 Miss. 90, 116 So. 438 (1928).

[17]Country Club of Jackson v. Turner, 4 So. (2d) 718, 721, cited *supra* note 15. For discussion of master's tort liability *see* Note, *Master's Tort Liability to Servant in Mississippi—The Fellow-Servant Rule* (1939) 12 MISSISSIPPI LAW JOURNAL 243.

[18]6 So. (2d) 319 (1942).

[19]5 So. (2d) 673 (1942).

[20]City of Tupelo v. Payne, 176 Miss. 235, 168 So. 283 (1936); Gulf, M. & O. Ry. v. Brown, 143 Miss. 890, 108 So. 503; (1926) International Shipbuilders Co. v. Carter, 121 Miss. 103, 83 So. 413 (1919); Note *Master's Tort Liability to Servant in Mississippi—Assumption of Risk* (1941) 13 MISSISSIPPI LAW JOURNAL 603.

arise during the course of the construction relating directly to features which are to become integral portions of the building and which do not involve hidden dangers the employee cannot protect himself against and at the same time do his work.

In *Mengel Co. v. Parker*,[21] plaintiff was engaged in tailing a rip saw. He was crowded into a space two-by-four feet; a table was situated two feet from his right upon which plaintiff placed the finished product; two feet from his left was a cull buggy and to his back was a trash basket. Material came from the rip saw at the rate of 70 feet per minute. The particular piece involved was 30 inches in length, and in the rush to his work plaintiff got delayed and was caught in the groin by this piece and was permanently injured.

The Court found that an allowance of 36 inches as a minimum would have been sufficient for plaintiff to have performed his work but that 24 inches was insufficient. Defendant proved that but for a trash buggy on wheels there would have been 36 inches and that plaintiff himself had placed the trash buggy where it was. Plaintiff proved that he had to place the buggy there because of a "flat", an object movable only by jacks which was located behind the buggy. This was sufficient to place the burden of proceeding with the testimony on defendant, which burden it did not meet. The law is not that in spite of defendant's negligence, still if the servant could by use of reasonable care perform his work there would be no liability. This would unduly stress the servant's avoiding care while obscuring master's duty of exercising care.

Defendant claimed plaintiff could have been relieved by an operation and that no recovery should be allowed for suffering. The Court dismissed this contention with three answers: (1) plaintiff paid by deduction from his salary for services of a doctor but the doctor did not suggest an operation until after suit was filed, (2) there was no evidence that plaintiff was financially able to have an operation, (3) when defendant claims mitigation the burden rests upon defendant as to this matter.

In the case of *Federal Compress Co. v. Craig*,[22] defendant compress had bales of cotton stored in tiers two bales wide and placed end on end two bales high with a third bale laid flat, making a total height of 142 inches. The tiers were of various lengths, this particular one being 40 feet long. Between the tiers were aisles into which plaintiff and his fellow workman were throwing the second deck, and while thus engaged the foreman threw a bale off the tier which struck and injured plaintiff. There was evidence that the custom was to shout "look out" when a bale was to be thrown, which was not done on this occasion. Plaintiff was so situated that his back was to the foreman.

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[21] 7 So. (2d) 521 (1942).
[22] 7 So. (2d) 532 (1942).

It is the duty of the master not only to institute a reasonably safe plan and method in the performance of the work, if such is practical, but also to see that the system is carried out.[23] If the master places the servant in a place or in a character of work where he cannot protect himself and do his work then the master must take reasonable care to warn the servant.

The verdict for the plaintiff could not stand in this case for three reasons: (1) The declaration charged the foreman negligently threw a bale of cotton upon plaintiff and injured him, but the foreman was a fellow servant at the time. (2) Plaintiff offered to amend his declaration but defendant objected, the objection being sustained on the erroneous theory that since some negligence was charged this was sufficient to prove any negligence. Defendant would have been entitled to a peremptory instruction under the declaration but since he objected to the amendment he cannot profit by his own wrong. (3) The main instruction for the plaintiff was susceptible of interpretation that danger alone is the test of liability.

D. Negligence

In *American Heating and Plumbing Co. v. Grimes*[24] action was brought for damage caused by fire to a school building. Defendant had contracted to install the gas heating equipment in the building. The heater which defendant installed in order to be safe should not have had any combustible material within six inches of it, but defendant installed the heater within two inches of a wooden stud placed there by the general contractor. Later, this same general contractor nailed wooden lathes even closer to the heater and plastered over same.

The Court held that one who installs a dangerous instrumentality is charged with knowledge of the particular dangers characteristic of the instrumentality and is required to use that degree of care commensurate with the danger and to guard and insulate against it. Defendant's foreman was asked by plaintiff's representative if the manner in which the heater was installed was dangerous and was assured that it was not. Defendant thus violated his duty to plaintiff and is liable therefore. He was under a duty to warn plaintiff of any dangers connected with the heater whether made by him or by the general contractor.

In *Birdsong v. City of Clarksdale,*[25] plaintiff while running to catch a ride with his neighbor one night fell in a ditch in front of his house. The ditch was caused by a leaking water meter of defendant. Plaintiff claimed he did not know of the existence of the ditch, and it was shown that the defendant had notice of same in time to have remedied the condition and that defendant had not placed a streetlight near the ditch. The neutral

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[23]*See* Note *Master's Liability to Servant in Mississippi—The Fellow-Servant Rule* (1939) 12 Mississippi Law Journal 243, 248.

[24]4 So. (2d) 890 (1941).

[25]191 Miss. 532, 3 So. (2d) 827 (1941).

space between the sidewalk and street where plaintiff fell was used for parking cars, walking and other like uses.

In residential districts pedestrians may cross at any place and the fact that plaintiff was running was only contributory negligence at the most, as the comparative negligence statute applies to municipalities as well as other defendants.

The doctrine that a municipality must use ordinary care to keep its streets reasonably safe for use of persons exercising reasonable care and caution[26] is a definition of duty and does not operate to deprive citizens of their rights.

In *Dixon v. Breland*,[27] plaintiff, an employee of defendant, was furnished a platform by defendant upon which to work in doing his work, and while working one of the planks slipped causing plaintiff to be injured. The jury awarded a verdict of $200, from which plaintiff appealed. As no contributory negligence was shown, the case was reversed on the question of damages alone, since plaintiff had been severely injured. In the case of *Mississippi Power Co. v. Stribling*,[28] plaintiff was employed by defendant to service refrigerators sold by defendant. The refrigerant used in the machines was sulphur dioxide gas which was highly inflamable to eyes, throat and lungs. Plaintiff claims he was not warned of this danger, nor furnished protection. He contracted tuberculosis for which suit is brought. The Court held that defendant was chargeable with knowledge of dangers and characteristics of materials used in its business and owed plaintiff the duty of both warning him of danger and furnishing protection against it. This is true even though defendant did not know that the gas would cause the particular disease contracted by plaintiff. The case of *Robinson v. Turfitt*[29] involved a statutory[30] action for negligently allowing fire to spread from defendant's land onto plaintiff's. The proof was close on both negligence and agency. Plaintiff introduced evidence that it was customary to burn ditches, fence rows, etc. in that section. It was error to allow this evidence as it proved neither negligence nor agency.

E. Railroads

In *Johnson v. Columbus & G. Ry.*[31] plaintiff's tractor was struck by one of defendant's passenger trains on a plantation crossing. The tractor was seen by the flagman 317 feet from the crossing at which time it was within 3 or 4 feet of the crossing. The engineer saw it when he was a

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[26]Greenville v. Laury, 172 Miss. 118, 159 So. 121, 123 (1935); Note (1938) 10 Mississippi Law Journal 175.

[27]6 So. (2d) 122 (1942). See Comment in connection with this case (1940) 12 Mississippi Law Journal 501.

[28]191 Miss. 832, 3 So. (2d) 807 (1941).

[29]4 So. (2d) 884 (1941).

[30]Miss. Code Ann. (1930) § 3422.

[31]7 So. (2d) 517 (1942).

distance of 150 feet from the crossing. The Court held that it was not only a question for the jury as to whether the engineer did all he could to stop the train when it became reasonably apparent that the tractor was going to be driven across the crossing but also as to whether the train whistle should have been blown as well.

In *Wilson v. Y. M. V. R. R.*[32] there was a statutory[33] action against defendant for allowing fire to spread from its right of way onto plaintiff's land. The action was for actual damages and statutory penalty of $150.00 but the jury only awarded a $50 verdict. The case was reversed, the Court stating that the statute was plain and unambiguous.

F. Miscellaneous

In *State Highway Commission v. Mason,*[34] plaintiff sued for the parking of defendant's heavy machinery on her property and for damaging the property in so doing. Plaintiff protested the parking of the machinery to one of the commissioners but to no avail. A demurrer to the declaration was overruled in the lower court. This was not an action of negligence but must be sustained under Section 17 of the Constitution.[35] Defendant cannot run its heavy machines on property of citizens, damage same and not make compensation therefor.

There was an action for the statutory penalty for cutting trees in the case of *Hays v. Lyon.*[36] Defendant's foreman sent defendant's servant across an old fence which had been standing for more than ten years and had them to cut trees on the adjoining land. Plaintiff protested the action both to the defendant and to the foreman and the attitude was characterized by the foreman's remark that he didn't give a d_____. The Court held that the Chancellor correctly ruled that the fence constituted the boundary line between the two pieces of property and that defendant's action and attitude, being characterized by wilful indifference,[37] were sufficient for the inflicting of the statutory penalty.

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[32] 6 So. (2d) 313 (1942).
[33] Miss. Code Ann. (1930) § 3422.
[34] 4 So. (2d) 345 (1941).
[35] Miss. Const. (1890) § 17.
[36] 7 So. (2d) 523 (1942).
[37] Seward v. West, 168 Miss. 376, 150 So. 364, 366 (1933).

VII.

STATISTICAL SURVEY

Table I is a general summary of the work done by the Mississippi Supreme Court during the September 1941, and March 1942, terms. The compilers gratefully acknowledge the assistance of Hon. Tom Q. Ellis, Clerk of the Supreme Court, who prepared this table from the original records of the Court.

Table II shows the disposition of the cases upon appeal and the Justice who wrote the opinion. Tables II, III, IV, and V were compiled from the cases appearing in the Southern Reporter and contain only the cases therein reported.

Table III is a topical analysis of the cases, by reference to the Justice writing the opinion. It should be borne in mind while consulting this table that the topic under which a case has been entered is not necessarily the only point involved or decided in the case, but it was necessary in many cases to draw an arbitrary line for the sake of tabulation.

Table IV shows the dissents and special concurrences.

Table V includes only the cases that were reversed and shows the reason for reversal. It was necessary to use broad classifications and to include only those errors that were responsible for reversal in two or more cases.

TABLE I

Cases on the Docket at the Opening of September 1941 Term	130
Cases on Docket at Adjournment June 1942	55
Motions Handled by the Court	72
Cases Decided Without Written Opinion	133
Cases Disposed of for Failure of Appellant to Prosecute Appeal	29
Suggestions of Error Filed	136
Suggestions of Error Overruled	132
Suggestions of Error Pending on Adjournment	14
Cases Decided in which Opinion was Written	237
Opinions Written on Suggestion of Error	9
Opinions Written on Motions	8
Cases Disposed of on Motion (Motions to Dismiss, Cases Compromised and Settled, Motions to Docket and Dismiss, etc.)	33
Total Cases Handled by the Court	410

TABLE II

	Alexander, J.	Anderson, P. J.	Griffith, J.	McGehee, J.	Roberds, J.	Smith, C. J.	Per Curiam	TOTAL
Affirmed	18	11	20	12	9	10	89	169
Affirmed and Remanded	---	1	---	2	1	2	---	6
Affirmed on condition of Remittitur	2	1	---	---	---	---	---	3
Affirmed in part, and Reversed and Remanded in part	---	---	---	1	2	---	---	3
Affirmed in part, and Reversed and Rendered in part	---	1	---	---	1	---	---	2
Reversed and Remanded	12	9	12	13	13	11	1	71
Reversed and Rendered	6	6	6	7	4	5	---	34
Appeal Dismissed	3	---	---	---	---	1	---	4
Suggestion of Error Sustained	1	1	---	---	---	---	---	2
Suggestion of Error Overruled	2	3	3	2	2	2	1	15
Motions Sustained	---	---	1	---	---	---	3	4
Motions Sustained in Part, Overruled in Part	1	---	---	---	---	---	---	1
Motions Overruled	---	---	1	---	---	---	---	1
Affirmed in Part, Reversed and Rendered in part, and Reversed and Remanded in part	1	3	---	1	3	2	---	10
TOTALS	46	36	43	38	35	33	94	325

TABLE III

	Alexander, J.	Anderson, P. J.	Griffith, J.	McGehee, J.	Roberds, J.	Smith, C. J.	Per Curiam	TOTAL
Agency	2	---	---	1	2	---	---	5
Appeal and Error	6	4	7	4	6	4	---	31
Attorney and Client	---	---	---	---	---	---	---	---
Automobiles	4	1	1	2	---	---	---	8
Banks and Banking	1	1	1	---	---	1	---	4
Bills and Notes	---	---	1	2	---	2	2	7
Carriers	---	---	1	---	---	---	---	1
Constitutional Law	2	---	2	2	1	1	---	8
Contracts	---	2	---	2	---	1	---	5
Corporations and Partnerships	---	2	1	2	---	2	---	7
Counties and States	2	2	2	1	3	1	---	11
Criminal Law	9	5	7	7	5	7	---	40
Damages	3	1	1	1	---	---	---	6
Eminent Domain	1	---	1	1	1	1	---	5
Equity	3	---	3	---	2	2	---	10
Evidence and Witnesses	1	3	2	---	3	1	---	10
Homesteads	1	1	1	---	---	1	---	4

Insurance	2	1	2	1	1	1	---	8
Intoxicating Liquors	1	---	---	3	1	---	---	5
Marriage and Divorce	---	1	2	---	1	---	---	4
Master and Servant	4	1	3	---	1	---	---	9
Mortgages	2	1	3	---	2	---	---	8
Municipal Corporations	2	1	1	---	---	---	---	4
Practice and Procedure	4	4	4	3	1	4	---	20
Railroads	---	1	1	3	---	---	---	5
Real Property	8	6	3	4	5	1	---	27
Remedies	2	4	4	2	2	3	---	17
Sales	---	1	1	---	---	---	---	2
Schools and School Districts	---	1	---	1	1	2	---	5
Statutes and Statutory Construction	2	1	2	5	5	6	---	21
Taxation	4	6	2	5	9	6	---	32
Torts	2	1	1	1	2	1	---	8
Trusts	---	---	2	---	1	---	---	3
Wills, Executors, and Administrators	1	5	1	3	1	3	---	14

TABLE IV

	Dissents with Opinion	Dissents without Opinion	Concurs in another Dissent	Concurs specially with Majority	Partly Concurring, partly Dissenting
Alexander, J.	3	1	2	2	1
Anderson, P. J.	7	1	3	1	1
Griffith, J.	3	---	5	3	1
McGehee, J.	4	---	3	---	3
Roberds, J.	2	1	3	1	1
Smith, C. J.	8	1	6	4	1

TABLE V

Error as to Law*	49
Verdict not Warranted by Evidence	15
Improper Instruction	13
Motion for Directed Verdict Improperly Overruled	12
Defective Pleading	8
Motion for Directed Verdict Improperly Sustained	4
Improper Admission of Evidence	3
Excessive Damages	2

*It is evident that this classification is sufficiently broad to include errors which may be otherwise designated in the remaining subdivisions of the table. However, there is no overlapping, and this general classification includes only those errors not susceptible to more specific description.

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THE WORK OF THE 1942 SESSION OF THE MISSISSIPPI LEGISLATURE

*Earl T. Thomas**

Necessarily, the ambit of an article in this Journal would exclude a discussion of the larger part of the enactments of the 1942 session of the Mississippi Legislature, and as to the remainder of these statutes as deemed germane and of interest to the general practitioner, the permissible limits of this paper would allow only comments of utmost brevity.

We must admit that most of the statutes evolving from the 1942 session of the Legislature have a definite relation to, or arose by virtue of, the emergency created by a nation being at war. Compelling though many objects of legislative thought must have been relative to this national emergency, in view of and in comparison with the compendious volumes of session laws emanating from past sessions, though without derogation as to the lawmakers thereof, we believe the legislators of the 1942 session are to be commended for the admirable restraint imposed upon themselves, as evidenced by the modest volume containing only 441 pages of printed matter in the session laws. This article, perforce, omits all references to appropriations, fiscal policies, revenue laws, departmental legislation, social enactments, school legislation, statutes relative to the powers of boards of supervisors, aldermen and other administrative boards, and similar legislation, and is confined to those statutes as to which it is thought the lawyer in his general practice has occasion to consult and probably face or use.

Criminal Law, Practice and Procedure

Concern for the safety and welfare of the nation, state and the citizenry thereof, when at war, found apt expression in accretions to, or amendments of, the criminal jurisprudence of our State. Widespread and continuous activity of various sects and groups, whose tenets were promotive of not only passivity and inertia relative to the national cause, but also of disloyalty and acts of violence, resulted in the prompt and praiseworthy passage of Chapter 178, popularly known as the "anti-sedition act." While the coverage of the statute, as noted, is extended, and provisions as to sentence thereunder slightly ambiguous, it is believed the same is impervious to attack as to its constitutionality. Recent newspaper accounts would lead the reader to conclude that this legislation was timely and critically necessary.

Mindful of the fact that the use of threats, violence or force were definite impediments to the production lines, provocative of breaches of the peace and detrimental to man's God-given right to work at a lawful occupation, the Legislature embodied Chapter 323 in our laws. Careful phrase-

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ology of the legislative draftsman studiously avoided, and did not impair, the constitutional right of "peaceful picketing" as being within the condemnation of the act. The ruthless racketeers, who seek not only to exploit labor but also to carry their points by fair means or foul, will find an effective deterrent in this act making it unlawful for anyone to use force, violence or threats of such, singly or collectively, to prevent any person from engaging in any lawful vocation.

As salutary supplements to national legislation on the subject of sabotage, the legislators of the 1942 session enacted Chapter 204 making it unlawful for anyone to bomb or in any wise destroy or attempt to destroy any buildings or facilities wherein are housed, or which are useful in the storage, manufacture, assembling or preparation for shipment of, any goods, wares or merchandise, apparently for use in the war effort. In this regard, however, the title of the act is more narrow and limited than the act itself, and because of a possible assessment of the death penalty thereunder and the broad and blanket coverage of the act itself, by its not delimiting the articles for use by or in connection with the political entities mentioned in and indicated by the title, it may be that the act will run counter to Section 28 of the Mississippi Constitution.[1] Having the same birth stimulus as Chapter 204, Chapter 183 came into being, it being an act to prevent intentional injury to, or interference with, property used in connection with war preparation or communications; and for practical purposes, the field of interdiction is the same for both Chapters 204 and 183, they both being salutary and vital for preservation of critical materials and properties during these turbulent times.

Realizing reluctantly that some citizens have to be driven or overly persuaded instead of being led, Chapter 175 was passed, the same being an act to provide for promulgation of rules and regulations for blackouts and the enforcement thereof. This was a comparatively new excursion into the field of assessment of a penitentiary sentence when the unlawful act is violative of rules of a body and not statutes of a state, but the practice is in accord with the growing national tendency. For purposes of information about the population of the state, citizens and aliens, and to insure adequate arms and material for police protection, Chapter 177, providing for the registration of weapons, was enacted. While the phraseology is perhaps unfortunate in that the act is addressed to those "owning" instead of "possessing" said firearms, the act is probably beneficent and conducive to the ends sought, because it is known that the citizenry very generally cooperated in the purpose and project.

Of moment and concern to practically all the citizens of the State was the act concerning the theft of a motor vehicle or rubber tire or tube, as set forth in Chapter 205. Stiff sentences accorded the culprits thereunder have served as unequivocal warnings to those inclined to "lift" the now highly-prized vehicular conveyances and appurtenances.

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[1]Compare the remarks of Judge Anderson in his dissenting opinion in the case of Brown v. State, 171 Miss. 157, 192, 157 So. 363, 364 (1934).

Chapter 284, defining and prohibiting lewdness, assignation and prostitution and providing penalties for violation thereof, was a necessary legal adjunct, particularly as an aid for and in the suppression of vice among or near the army bases or camps or defense centers.

Practically all of these statutes emerged under the stimulus of the existence of a state of war and the consequent war effort. In the field of criminal law or procedure, however, the Legislature at the 1942 session passed several laws having no military birth or affinity. Chapter 285, creating a reformatory for delinquent negro juveniles at the Oakley State Farm, together with Chapter 68 appropriating the sum of $60,000 for building purposes, and Chapter 69 appropriating $50,000 for the support and maintenance of the same for the fiscal years 1942-1943, witnessed the enactment of legislation long fought for by those who had studied and worked with the problem of juvenile delinquency in this State.

The increasingly burdensome duties devolving upon the Chief Executive of the State relative to applications for pardons or other forms of executive clemency prompted the Legislature to come to his aid and enact Chapter 283, creating a State Pardon Board and defining and fixing their duties and compensation, and this body should prove to be a useful advisory and helpful one for the Governor in the discharge of his constitutional duties in regard to the subject.

To validate, confirm, clarify and authorize a practice, long indulged in by some judges, Chapter 301 came into being, amending Section 1319 of the Mississippi Code of 1930 so as to provide that circuit and county court judges may impose sentences to run concurrently when assessed against the same individual at the same term of court. The recognized and authorized prevalent practice of the Federal judges in this regard probably contributed to conformity to it by some of our State judges—but without statutory warrant therefor—and further served to educate the public to the fact that the practice was wise and humane and the legislature would do well to lodge the discretion in our State judges administering the criminal law.

The Civil Law and the Courts

Insofar as the laws pertaining to civil actions and the general laws, excepting the criminal laws, as daily administered and interpreted in the State Courts are concerned, the convening of the 1942 session of the Mississippi Legislature witnessed the adoption of but few measures in this field, either as original or amendatory enactments. The safety of the nation and of the state was the subject at hand, and a legislative body, mindful of the motto, *Salus populi suprema lex,* would sponsor and pass appropriate laws. Insofar as general laws were concerned, the laws affecting civil actions or private rights would inevitably bow in favor of those affecting the State's safety and preservation, and thereby the criminal jurisprudence would be accorded priority rating.

It took the discovery of oil and gas in Mississippi to convince our citizens that a "cottonpatch" title was far different from an "oil and gas" title. Undoubtedly this rude awakening or discovery played its part in the

crystallization into law of Chapter 300, the act which provided for a reasonable statute of limitations to protect against certain minor defects in recorded instruments. Anyone having a right of action for the recovery of land because of any one or more of ten designated defects in any instrument or its recordation was given not later than ten years next after the date when such instrument has been or hereafter may be actually recorded in the chancery clerk's office of the county in which the real estate is situate for the beginning of said action, with proper provisos as to the case of instruments of record nine years and six months or more prior to the effective date of the act and also for persons under disabilities. The act expressly excepted forged instruments from the operation or coverage thereof.

A. Chancery

Section 375 of the Mississippi Code of 1930 relative to the time within which a defendant in chancery shall answer or demur was amended by Chapter 299 of the late legislative session. The amendment consisted in re-enacting the cited code section but substituting the words, "second Monday of the month" for the words, "monthly rule day" as appeared in the code section. Confusion and perplexity had arisen as to a construction of the code section when a term of court was in session during the second Monday of the month succeeding that to which process was returnable on a rules day. The amendment clarifies the construction as to the time for the filing of the applicable pleading, whether the court be in vacation or term time, or the matter be before the clerk at rules, and makes more understandable various decisions[2] on the subject.

The 1942 session in enacting Chapter 305 saw fit to amend Chapter 268 of the Laws of Mississippi of 1938 and Section 358 of the Mississippi Code of 1930, with reference to the adoption of children. The section as amended provides for recognition to be given to a writing signed and acknowledged or sworn to before a competent officer by the parents or either of them of a child who was the subject of adoption wherein was designated some person or benevolent, charitable or religious organization so that said nominee would have to be made a party to the adoption proceedings or consent of said nominee obtained for adoption in lieu of the parents' consent. An additional insertion in said amendment provided that the court or chancellor in the decree of adoption should fix as nearly as possible the place and date of birth of the adopted person.

B. Circuit and County Courts

In order to make the amendment of a declaration as flexible and as easily made as in the chancery court, Chapter 304 was passed, whereby the plaintiff in any suit was allowed to amend his declaration without applying to the court, at any time before the defendant has filed a plea, upon his paying the costs of furnishing a copy of the amended declaration to such of the defendants or their attorneys as have taken out copies of the original

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[2]E. *g.*, Jones v. Hervey, 66 Miss. 99, 5 So. 512 (1888).

declaration, and his giving notice of the amended declaration to all of the defendants. This act, save for the nomenclature as to parties and pleading, is an identical re-script of Section 393 of the Mississippi Code of 1930, relative to the chancery practice in this regard.

To obviate the confusion incident to the trial of eminent domain cases in county courts and in the circuit courts on appeal from courts of justice of the peace, the Legislature passed Chapter 302. The statute, more or less, was a legislative validation and clarification of what the Supreme Court had previously virtually put at rest in late adjudicated cases.[3]

Constitutional Amendments—Approved and Suggested

By House Concurrent Resolution No. 9, embodied in and appearing as Chapter 329, the Legislature formally inserted in the Mississippi Constitution Section 211 of said Constitution as Amended, this amendment having been theretofore passed upon by a preceding session of the legislature and the electorate of the State. The amended portion of this section consisted in the addition to Section 211 a provision to the effect that all lands granted in lieu of sixteenth section lands in this state and situated outside of the county holding or owning the same may be sold and the proceeds from such sales may be invested in a manner to be prescribed by the legislature. Inasmuch as the provisions thereof were not self-executing, the Legislature wasted no time in passing the supplemental and enabling legislation in the passage of Chapter 162, establishing the lieu land commission for the sale of the lieu lands, and providing for both state and local approval through the designated officials of the sale of the lieu lands, but providing that one-half of all oil and mineral rights in and to said lands should be retained by the commission and remain the property of the township owning the lands.

Section 211 of the Constitution as thus amended, however, did not long satisfy the legislators that it fully and finally covered and met the applicable subject. Tinkering with the section in the manner outlined in the foregoing paragraph had but exposed another defect that must be repaired. Thus House Concurrent Resolution No. 17, set forth in Chapter 333, resulted in adoption by both houses of another amendment on each of the three readings in each house, which was made ready for submission to the voters. As therein appears, it is now sought further to amend Section 211 so as to provide that "16th section lands reserved for the support of the township schools shall not be sold nor shall they be leased for a longer term than ten years for lands situated outside of municipalities and for lands situated within municipalities for a longer term than 99 years for a gross

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[3]Miss. State Highway Commission v. Reddoch, *et al.*, 184 Miss. 302, 186 So. 298 (1939); and Miss. State Highway Commission v. Hillman, *et al.*, 189 Miss. 850, 198 So. 565 (1940).

sum," and to provide further that existing leases of the 16th section lands situated in the municipalities of the state may, for a gross sum, be extended for a term of years not exceeding 99 years from the date of such extension.

Senate Concurrent Resolution No. 11, appearing as Chapter 342 of the session laws seeks to amend Article 8 of the Mississippi Constitution so as to add a new section. This amendment is designed to have the effect of "taking out of politics" the colleges and universities of the State, and by organic law to make the control thereof not subject to the passing whim and fancy of each incoming Governor and Legislature. By a provision for staggered terms, and other safety-valve provisions, it would appear that the suggested amendment would effect the purposes desired and ends sought, if we view the same in long-range perspective.

Miscellaneous

Of interest and concern to the practicing lawyer of the State is Chapter 318 providing for the compilation, annotation, indexing, printing and distribution of the general statutes of Mississippi of a permanent nature by the attorney general of Mississippi, the compilation not to exceed eight volumes in size. It is provided that this compilation shall cover all amendments to the Constitutions of the United States and Mississippi, all sections of the Mississippi Code of 1930 and the amendments thereto and all session laws of a general and permanent nature which have been enacted since the publication of the 1930 Code down to and through the regular session of the 1942 legislature. Provision is made that the publishers should not charge any resident of this State any price in excess of the initial price per set charged the State for the first thousand sets purchased by it, the "ceiling" as to the State quotation being $50.00 per set. Unlike authoritative codification of laws, supplanting and displacing all prior laws or codes, the present authorized set is scarcely more than a convenient and compact compilation, for Section 11 of said Chapter 318 provides that in the event of a conflict between any section of the compilation and any section of the Mississippi Code of 1930 and the original statutes subsequent thereto, said 1930 Code and statutes subsequent thereto shall prevail and be controlling. The careful lawyer, therefore, in his quest for the applicable law, will have to make both search and re-search.

The usual run or number of validation, curative and amnesty acts were passed by the 1942 session. School districts (Chapter 153), Housing Authorities (Chapter 232) and Corporations (Chapter 295) all received the blessings from their merciful benefactor and sovereign, in "washing away all sins" and bathing them anew in the usual validative and curative statutes.

Commendable and praiseworthy consideration of the problems of the men now in, or hereafter entering, the armed forces of our country was evidenced in the passage of various laws for their benefit. Continuance of

homestead exemptions was vouchsafed them (Chapter 189); compensation benefit rights to them were preserved (Chapter 198); they may vote by absentee ballot without payment of poll tax (Chapter 202); exemption of lawyer members thereof from payment of bar dues was assured (Chapter 186); and applicants within draft age for law license may take special bar examinations under certain conditions (Chapter 172).

Chapter 235 was in amendment of Sections 6024, 6025, 6026, 6046 and 6047 of the 1930 Code and certain sections of Chapter 174 of the laws of 1936 relative to the issuance of patents, the purchase of tax-forfeited or escheated lands, the cancellation of patents when the State has no title, and the striking off of certain lands claimed by the State, and the revision and maintenance of the records of the land office. Chapter 237 was in aid of chapter 235, outlining and prescribing a uniform system wherein the chancery clerks would certify tax-forfeited lands to the State, and whereby could be determined the amounts owing the various taxing districts out of purchase price of lands sold by Land Commissioner.

Protection of the investing public was the motivating concern behind the enactment of Chapters 297 and 298, whereby the Secretary of State was vested with broad powers in passing on the worth and integrity of those selling stocks, bonds and securities to the public. The two measures, in a manner, imposed duties upon the Secretary of State comparable to those with which the Federal Securities and Exchange Commission is charged.

The parental care and solicitude of a State for its helpless citizens is evidenced in Chapter 282, wherein benefits were provided for persons who are unemployable, and who are bed-ridden, chair-ridden, or unable to walk and who are in great need of food, clothing, shelter, because of physical disabilities.

A definite procedural vehicle is accorded foreign corporations who desire to withdraw from this State, with proper safeguards therein appearing for the protection of all local creditors or persons having claims against said corporation (Chapter 206).

After heated argument and acrid debate, the Legislature extended the free-textbook program to include through the twelve grades of school, as exemplified in Chapter 152. Much to the satisfaction of the now fast-disappearing motor traveling public, but to the dissatisfaction of the local beneficiaries thereof, the Legislature embodied Chapter 292 in the laws of the land, thereby prohibiting the collection of tolls on any state highway or on any bridge wholly within this state, which is a part of such highway. At this writing, unless things go awry, it is apparent that a closely contested, and probably long, court battle is in the offing, because of the passage of this law and the enforcement thereof.

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